JD–66–04
Muskegon, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

JOHNSON TECHNOLOGY, INC.

and

Cases 7-CA-45747
7-CA-45795

IUE-CWA, THE INDUSTRIAL DIVISION OF
COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO, CLC

and

WORKING @ GE (W.A.G.E.)

Erikson C.N. Karmol, Esq. and *Judith A. Schulz, Esq.,*
for the General Counsel.
Robert W. Sikkel, Esq., of Holland, Michigan, and
Robert A. Dubault, Esq. of Muskegon, Michigan
for the Respondent.
Susan Byrnes, Esq., for the Charging Party – IUE\CWA.

DECISION

Statement of the Case

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Grand Rapids, Michigan, on December 10–11, 2003, and January 26–28, 2004. The amended consolidated complaint alleges that the Respondent, Johnson Technology, Inc., violated Section 8(a)(1), (3), and (4) of the Act by denying Michael Crane the opportunity to transfer to another department; by requiring him to enter into a last chance disciplinary agreement; and by discharging him because he testified at a Board unfair labor practice hearing, filed an unfair labor practice charge against the Company, assisted in an organizing campaign conducted by the IUE-CWA, The Industrial Division of Communications Workers of America, AFL-CIO, CLC (the Union or IUE), assisted the Working @ GE (WAGE) in developing a program to improve working conditions and in disseminating information to employees, and engaged in protected concerted activities. It further alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Charles Durham because he likewise assisted the Union in an organizing campaign; assisted WAGE in developing and implementing a program to improve working conditions, and assisted in disseminating information to employees; and because he engaged in protected concerted activities.

The Respondent's timely answer effectively denied the material allegations of the amended consolidated complaint. The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file briefs.

On the entire record, including my observation of the demeanor of the witnesses, as well as my credibility determinations based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole, and after considering the briefs filed by the General Counsel, the Respondent, and counsel for the Charging Party Union/WAGE, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, with an office and facility at 2034 Latimer Drive in Muskegon, Michigan, manufactures component parts for aerospace and turbine engines. During the 12-month period ending December 31, 2002, the Respondent derived gross revenues from all resources in excess of $500,000 at its Latimer Drive facility and it purchased and received materials and supplies valued in excess of $50,000 directly from suppliers located outside the State of Michigan. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits and I find that the IUE is a labor organization within the meaning of Section 2(5) of the Act.

II. The 2(5) Status of WAGE

The amended consolidated complaint alleges, and the General Counsel argues, that WAGE is a separate labor organization within the meaning of Section 2(5) of the Act. Although the Respondent's answer neither admits nor denies allegation, it argues in its posthearing brief that WAGE does not meet the "dealing with" requirement of Section 2(5) as interpreted under Board law and that WAGE is actually a part of the Union with a mission to continue the organizing drive. Specifically, in its posthearing brief at pages 14-15, the Respondent argues:

> The evidence compels the conclusion that WAGE was established –not as a labor organization to deal with Johnson Technology on work issues–but rather was a mere organizing tactic of an already existing labor organization: the IUE/CWA. WAGE's own newsletter stated that the "ultimate goal [of WAGE was] to empower workers to win union recognition and gain coverage under the IUE-CWA/GE National Agreement." [GC Exh. 21(A); *see also* R. at 103] (Crane stating "our ultimate goal was to continue on with the organizing campaign and ultimately get the national contract.").

I agree for the following reasons.

Section 2(5) of the Act defines a labor organization as

> any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, ….or conditions of work.

In *Vencare Ancillary Service,* 334 NLRB 965, 969 (2001), the Board stated:

> for unrepresented employees collectively to constitute a labor organization under Section 2(5) of the Act: (1) employees must participate; (2) the organization, must exist, at least in part, for the purposes of "dealing with" the employer; and (3) these dealings must concern "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." See *Electromation, Inc.*, 309 NLRB 990, 994 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994).
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> The term "dealing with" contemplates "a bilateral mechanism involving proposals from an employee committee concerning subjects listed in Section 2(5), coupled with real or apparent consideration of those proposals by management." *Electromation*, supra, 309 NLRB at 995 fn. 21. The Board has required that "dealing with" consist of "a pattern or practice in which a group of employees, over time, makes proposals to management, [and] management responds to those proposals by acceptance or rejection." *Stoody Co.,* 320 NLRB 18, 20 (1995), quoting *E.I. du Pont & Co.*, 311 NLRB 893, 894 (1993). "If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pattern or practice, the element of dealing is present. However, if there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing." Id.

The evidence shows that WAGE was started by the Union in December 2001 after the Union lost a Board election. WAGE is a group of the Respondent's employees, who supported the Union through the unsuccessful organizing campaign.[1] The group meets monthly, has elected officers, publishes a newsletter, and solicits employees to join. Employees who join WAGE and voluntarily pay dues are called "members." Employees who join but pay no dues are called "supporters." (Tr. 39, 76.) Because the evidence shows that the Respondent's employees participate in WAGE, I find that the first element of the test has been satisfied.

Regarding the "dealing with" element, the evidence shows that WAGE was formed to sustain an interest in the Union with the goal of promoting discussion about employee terms and conditions of employment. (Tr. 39.) As explained by Union Organizer Larry O'Brien, WAGE "is workers grouping together to improve their working conditions in the shop, in places where elections have been lost or places where strategically we don't feel we are in a position to go into an elections. It is an in-between having nothing and having collective bargaining." (Tr. 574.) Union Organizer Julie Riger stated that "the purpose of WAGE is to help build and get a Union, but it is to help educate those people in WAGE about family medical leaves, about workers' comp, American Disability Act, MIOSHA, and the Bullard-Plawacki, personnel records, and how to do things to help people on unfair treatments." (Tr. 39, 43.)

Recruiting literature distributed by WAGE describes the committee as:

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[1] The WAGE program originated at the Respondent. Additional WAGE groups subsequently were formed at other General Electric facilities where the Union's organizing efforts have been unsuccessful. (Tr. 82-83, 574, 576, 609; GC Exh. 22, p. 3.)

a group of workers like yourself who are coming to together at GE plants across the country to improve their life on the job.

To join WAGE, you pay $10 a month and become an official voting member of IUE-CWA. You would form, with the help of IUE-CWA local unions at GE, a WAGE committee to pressure GE management to improve:

- Wages and benefits;
- Safety and health conditions;
- Training opportunities; and
- How you are treated on the job.

At the same time, you are a member of the IUE-CWA. As such, you can:

- Elect your own officers.
- Vote for IUE-CWA Division offices.
- Participate in national negotiations with GE.
- Become eligible for Union Privilege Benefits, such as $10,000 in free workplace accident insurance, free and discounted legal insurance, low-cost mortgage programs, the union MasterCard, union family discount programs and more.
- Become eligible for thousands of dollars in union-family only scholarships. (GC Exh. 50.)

The same literature states that WAGE works as follows:

Do we have a contract with GE?

No, but that is our goal, to win our own collective bargaining agreement with GE. By working as a group, GE cannot ignore us and it cannot retaliate or discriminate against us in our efforts to improve our working conditions.

If we don't have a contract, what protections do we have?

As workers engaged in concerted action you have all the federal legal protections mandated by the National Labor Relations Act. Those include freedom from:

- Surveillance;
- Interrogation; and
- Threats & discrimination.

There is no evidence, however, of a bilateral mechanism to consider proposals from WAGE concerning subjects listed in Section 2(5), coupled with real or apparent consideration of those proposals by management. *Electromation,* supra, 309 NLRB at 995 fn. 21. Nor is there any evidence of any "pattern or practice" of WAGE making any proposal to the Respondent concerning terms and conditions of employment, followed by management's acceptance or

rejection of the same by word or deed. At best, the evidence shows that on one occasion WAGE attempted to complain to the Respondent about a perceived Michigan Occupational Safety & Health Administration (MIOSHA) violation concerning the removal of a tile floor that purportedly contained asbestos. Union Organizer Larry O'Brien testified that WAGE Secretary Michael Crane sent a letter on behalf of the group to the Respondent, but received no reply.[2] (Tr. 580.) Crane sent a second letter from himself and received a response from the Respondent's president, David Yacavone. (GC Exh. 25(b).) Thus, the evidence shows that the Respondent declined to acknowledge and deal with WAGE on a subject arguably covered by Section 2(5).

In addition, the evidence shows, and the Respondent argues, that WAGE is actually a part of the Union. The WAGE main office is located within the IUE-CWA organizing department in Washington, DC. (Tr. 70.) It has no local offices of its own, but instead operates out of the IUE-CWA local offices. (Tr. 50, 84.) WAGE dues are sent to the IUE-CWA International Union in Washington, DC, and a check for all or part of the dues is returned to the local WAGE financial secretary. (Tr. 77, 203-204.)

Based on the evidence viewed as a whole, I find that WAGE is not a separate labor organization within the meaning of Section 2(5), but instead is a part of the IUE-CWA, and that WAGE was founded by the Union in order to sustain an active interest in organizing the Respondent's employees.

III. Alleged Unfair Labor Practices

A. The Respondent's Business

The Respondent manufactures component parts for aerospace and turbine engines. It employees approximately 400 workers at two facilities in Muskegon, Michigan. Only one of those facilities, the Latimer facility, is involved in this case. (Tr. 89-94.) Its manufacturing operation is divided into eight units or "cells" each containing one or more lines of machinery. In all of the cells, except cell 3, the Respondent owns the castings or parts. (Tr. 826.) In cell 3, the parts are owned by the customer, who consigns them to the Respondent for modification in accordance with the customer's specifications.

Cell machine operators are responsible for modifying a part, inspecting their own work, and passing the part down the line where other operators make other modifications to the part. (Tr. 119.) Upon completing a modification, an operator is responsible for signing a "router" which is a form that accompanies each part as it moves down the line from operator to operator. (Tr. 125.) By signing the router, the operator certifies that he has inspected the work he has performed on the part and that it meets the specifications of the methods of operation sheet. (Tr. 721.)

If an operator, upon inspection, finds that he has produced a defective part, he could contact a supervisor or quality engineer to determine (1) if the part can be repaired, (2) if the part has to be scrapped, or (3) if the part is acceptable "as is". (Tr. 722-723.) The operator could also attempt to repair the part himself depending upon the nature of the defect. If the part cannot be easily repaired, the operator must "tag" the part by completing a nonconformance tag,

[2] The first letter was sent in late February 2002. The second letter under Crane's signature alone was sent in early April 2002. (GC Exhs. 25(f) and (b).)

thereby sending the part to a material review board (mrb) table, rather than down the line.[3]

In all cells, except cell 3, there are inspectors who perform in-process inspections, which means that they can inspect a part anywhere along the line. (Tr. 725, 830, 964.) An inspector who finds a defective part along the line can (depending upon the nature of the defect) attempt to repair the defect or return it to the operator to repair. If the part cannot be easily repaired, the inspector must tag the part thereby sending it to the mrb table.

The inspectors also perform a final inspection. (Tr. 730.) If a defective part is found at final, it would be "tagged" and the cell supervisor would determine the "root" cause of the defect (e.g., operator error, machine malfunction, fixture malfunction, or process capability). There are various codes that are assigned to different types of errors. (Tr. 724, 798.) The codes for an operator error are CPA-03 or 303. (Tr. 799.) After determining the root cause of the error, the supervisor determines the corrective disciplinary action, if any, to be taken. In all cells, except cell 3, the disciplinary process includes a verbal, written, and final warning. (Tr. 800.) If a defective part attributed to operator error is found at final, the operator responsible could be disciplined, if the operator is in the bottom 20 percent of rolling quantity.[4] (Tr. 731, 963-964.)

Cell 3 is different from all other cells in several respects. First, as explained above, cell 3 parts are owned by the customer and given to the Respondent for processing in accordance with the customer's specifications. (Tr. 825, 965.) After processing is complete, the Respondent sends the part back to the customer. If an error is made, and if it can be corrected, the customer must be willing to accept the correction. Otherwise the cost of the part, as well as the time spent processing the part, is charged to the Respondent.

In addition, the parts in cell 3 are larger and heavier than the parts in other cells. Cell 3 parts typically weigh 50-130 pounds and are hard to load. (Tr. 525-526, 725, 826.) Because of the size and weight, only 3-4 parts a day can be completed in cell 3. In other cells, the parts weigh 2-5 pounds and are easier to load and unload. Other cells complete anywhere from 35-40 parts a day.

Significantly, there are no in-process inspections in cell 3. (Tr. 745.) A part is inspected by an inspector at the end of the line in a final inspection. (Tr. 431, 719.) It is very important, therefore, that the cell 3 operators inspect their work carefully before sending a part down the line.

Finally, the disciplinary process in cell 3 is different. In late 2001–early January 2002,[5] the Respondent implemented a disciplinary process in cell 3 in which defective parts "found at final" inspection would result in discipline. (Tr. 620-621.) The change in the disciplinary process in cell 3 was prompted by an exceedingly high number of defective parts that were being passed down the line because operators were not inspecting their work. (Tr. 626, 746, 831.) The Respondent estimated that as a result of operator errors it had acquired approximately a

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[3] If an operator down the line finds a defective part that was passed along by the operator before him, he must tag the part and place it on the mrb table. (Tr. 722-723.)

[4] Rolling quality is a 6-month assessment of an employee's work quality in comparison to other employees within the department as expressed as a percentage rating. In all cells, except cell 3, an employee who falls within the lowest 20 percent of the rolling quality for a particular time period is placed into disciplinary warning status. (Tr. 143.)

[5] Michael Crane testified that the policy began in the fall of 2001. (Tr. 127.) Cell 3 Supervisor Matt Carlyle testified that the found at final policy was implemented in late 2001. (Tr. 793-794.)

one-half million dollars worth of customer-owned inventory in scrap and reworked parts. In order to impress upon the cell 3 operators the need to inspect their own work and to tag their own defective parts, the Respondent implemented the cell 3 "found at final" policy. (Tr. 626, 832.) Before doing so, however, employee meetings were held to emphasize the need to inspect parts before releasing them and to explain that failure to do so would result in progressive discipline, including verbal warning, documented verbal warning, written warning, final warning, and discharge. (Tr. 184, 236, 794, 832.) This particular disciplinary process only applied to cell 3. (Tr. 184.)

B. The Organizing Attempt Falls Short – WAGE Is Formed

In year 2000, the IUE initiated an organizing campaign seeking to represent the Respondent's hourly employees at both plants.[6] (Tr. 23-23.) The Respondent vigorously opposed the organizing campaign. (Tr. 29-30, 37-38, 463; GC Exhs. 3 (A) and (B).)

In June 2001, the Union organizing committee held a meeting to discuss whether to file a representation petition seeking an election or, alternatively, to establish a WAGE group. Certain members of the IUE organizing committee did not believe that there was sufficient employee support to prevail in a union election and, therefore, wanted to establish a WAGE committee. Others disagreed. It was eventually decided to seek a union election.

On September 14, 2001, a representation petition was filed. (Tr. 25.) On October 24, 2001, an election was held during which a majority of employees voted against Union representation. (Tr. 29, 42.) No objections to the election were filed.

In early December 2001, a meeting was held to establish a WAGE committee of the Respondent's employees. (Tr. 42.) Potential WAGE members were advised of the meeting through mailings and phone calls. Some employees, who attended, signed membership applications to become dues paying members, while others became nondues paying "supporters." A steering committee was created and some of the leading IUE advocates were initially appointed to official positions.

The following month, January 2002, another meeting was held to recruit more members. Thereafter, the group met on a monthly basis off the Respondent's premises. Eventually

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[6] On January 30 and February 21, 2001, a hearing involving the parties to this case was held before Administrative Law Judge Earl E. Shamwell Jr., concerning several alleged 8(a)(1) violations, which occurred during the Union organizing campaign. On July 31, 2001, Judge Shamwell issued a decision finding that several aspects of the Respondent's conduct violated Sec. 8(a)(1) of the Act. *Johnson Technology, Inc.* JD-103-01 (July 31, 2001), 2001 WL 1589707. (GC Exh. 3(A).) Exceptions were filed and Judge Shamwell's decision is pending before the Board. At trial in this case, I granted the General Counsel's motion in limine seeking to preclude the reintroduction of the testimony and other evidence presented in Judge Shamwell's case in order to establish animus. (Tr. 7-11.) I also granted the General Counsel's motion to take judicial notice of Judge Shamwell's decision solely as to his factual findings reflecting antiunion animus, but not as to his legal conclusions which are still pending before the Board. (Tr. 11-12.) In addition, I granted the Respondent's motion to take judicial notice of a subsequent decision issued by Administrative Law Judge Arthur J. Amchan, in which he found that other conduct of the Respondent during the same organizing campaign did not violate Sec. 8(a)(1) of the Act. *Johnson Technology, Inc.,* JD-95-02 (Sept. 5, 2002), 2002 WL 31014717 (Tr. 12-13; GC Exh. 3(B).) No exceptions were filed to Judge Amchan's decision.

permanent officers were elected and training sessions were held to educate members and supporters about various State and Federal employee protective statutes. (Tr. 55-56, 105.) A local WAGE newsletter was created and distributed to the Respondent's employees.

C. Michael Crane

1. Facts

Michael Crane began working for the Respondent in July 1996 as a machine operator. He eventually was promoted to a technician position, which required additional training on different types of machines and participation on various in-plant committees. (Tr. 91.) In 2002, Crane was 1 of 22 operators working on the second-shift in cell 3.[7] He had the third highest seniority on that shift and was approximately 15th in overall seniority in cell 3.

Crane was an active and open supporter of the IUE during the organizing campaign.[8] (Tr. 62, 95.) He attended weekly meetings of the organizing committee, solicited employees to support the Union, passed out Union literature at the workplace, and wore Union T-shirts and other paraphernalia on the job. (Tr. 24, 79, 98.) Crane testified that when he wore a Union T-shirt, his supervisor, Second-shift Coordinator Matthew Carlyle, more than once asked him, "Don't you have a better shirt to wear?" or "Isn't that shirt getting worn out?" (Tr. 100.) Carlyle denied telling Crane that he "needed a different shirt." (Tr. 791.) I credit this denial because it was articulated convincingly with conviction. Crane also testified that once when Carlyle was passing out anti-Union T-shirts to employees, he refused to give Crane a T-shirt. Crane stated that when he asked Carlyle what he needed to do to get a T-shirt, Carlyle told him that needed he removed his Union paraphernalia and change his vote to no union. (Tr. 101.) Carlyle testified that he refused to give Crane a T-shirt because Crane told him that he would not wear it. (Tr. 791.) Carlyle did not, however, specifically deny telling Crane that he told Carlyle to remove his paraphernalia and change his vote. In the absence of a specific denial by Carlyle, an adverse inference is warranted that he made the statements attributed to him by Crane. *Asarco, Inc.,* 316 NLRB 636 fn. 15 (1995), modified on other grounds, 86 F.3d 1401 (5th Cir. 1996). I therefore credit this aspect of Crane's testimony.

Crane was also one of the first dues paying members of WAGE. (Tr. 78, 101-102.) He joined WAGE in June 2001, when the Union organizing committee was debating whether to go forward with a Union election or start a WAGE group. After the Union lost the election, he solicited employees to become dues paying members of WAGE and encouraged them to attend the December 2001 WAGE meeting. He distributed WAGE newsletters to the employees at work,[9] contributed articles for publication in the newsletter, and wore a WAGE button in the workplace. (Tr. 48-49, 104, 115, 117; GC Exhs. 20(B) and (C).) In January 2002, Crane was appointed to the position of WAGE financial secretary/safety coordinator by Union Organizer Larry O'Brien. A few months later, the WAGE membership elected him to that position. (Tr. 46-47.) Crane had business cards printed disclosing that he was the WAGE "Secretary, Treasurer." (GC Exh. 21.)

In January 2002, the Respondent sanded a floor of tiles, which contained asbestos.

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[7] Approximately 65 employees worked on all shifts in cell 3 at that time.

[8] The evidence shows that the IUE did not provide the Respondent with the names of the employees on its organizing committee. (Tr. 72.)

[9] Union Organizer Julie Rigor testified that she routinely mailed a copy of the WAGE newsletter to the Respondent's president, Paul Yacovone. (Tr. 49, 51.)

Crane told the WAGE committee that the sanding presented a possible health hazard. The committee asked Crane to file a complaint with the Michigan Occupational Safety & Health Administration (MIOSHA) asserting that the work being performed presented a hazard to employees in the area.[10] (Tr. 111.) MIOSHA eventually determined that the work performed did not present a hazardous condition. (GC Exh. 25 (d) and (3).)

In February 2002, Crane also sent a letter on behalf of WAGE to the Respondent's president, Paul Yacovone, concerning the potential health hazard. Yacavone did not respond to that letter. (Tr. 580.) In April, Crane sent another letter to Yacavone, but this time he signed the letter as an individual. Yacavone responded to the second letter explaining why he did not believe that the working conditions presented a potential health hazard. (GC Exhs. 25(b)-(e).)

a. Cell 3 quality issues

In late December 2001–early January 2002, the Respondent implemented the "found at final" disciplinary policy in cell 3. In the weeks that followed, Michael Crane received a number of disciplinary warnings concerning the quality of his work.[11]

On February 13, 2002, Crane failed to properly inspect a part before sending it down the line. Cell 3 Supervisor Matthew Carlyle testified that on February 27, 2002, he gave Crane a verbal warning for missing four holes on a part that was found at final.[12] (Tr. 748, 754; R. Exh. 1.) Carlyle stated that the missing holes were not attributed to operator error and could have occurred because of machine malfunction. (Tr. 751, 755.) He, nevertheless, gave Crane a verbal warning because he failed to properly inspect and detect the missing holes before passing the part down the line. Crane did not recall receiving a verbal counseling discipline in February 2002 for a missing hole found at final. (Tr. 189.) On the other hand, it did not deny that he ever received one.

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[10] Crane testified that he intended to file the complaint as a WAGE representative. However, there was no reference to WAGE on the MIOHSA form and Crane checked a box on the form electing to have his own name withheld from the Respondent. (See GC Exh. 25(a).) I find his assertion that he filed the complaint on behalf of WAGE is incredulous.

[11] Crane testified that in 2001, prior to implementation of the "found at final" policy, he had four or five defective parts returned to him by an inspector to fix without being tagged. (Tr. 126.) Crane conceded, however, that on October 28, 2001, he received a verbal warning for failing to drill a hole in a specified location on a part. (Tr. 188.)

[12] The General Counsel has renewed its objection to the introduction of R. Exh. 1 and the related testimony of Supervisor Carlyle, which I denied at trial. (Tr. 748-758.) There, it was argued that the document was not provided in response to subpoena duces tecum request no. 1, which sought the complete personnel files of Michael Crane and Charles Durham. (Tr. 748-751; GC Exh. 6.) Carlyle testified that because the nonconformance tag was not attributed to operator error it was never placed in Crane's personnel file in accordance with practice. (Tr. 750-752.) Rather, it was placed in a nonconformance tag file which is kept in the mrb cage. Because document request no. 1 specifically asks for the contents of Crane's personnel file and because this document was not in Crane's personnel file, I denied the original objection and for the same reason I deny the renewed objection. In addition, I note parenthetically that the General Counsel does not argue, and has never argued, that the Respondent failed to give Crane a verbal counseling in accordance with the cell 3 disciplinary procedure. Nor has the General Counsel argued that the failure to turnover the document, even if it was covered by the document subpoena, which it was not, prejudiced the General Counsel's case. For these additional reasons, I deny the renewed objection.

On March 13, 2002, Carlyle found a defective part on the final inspection table that was passed off by Crane. He gave Crane a written verbal warning which stated, "Backwall burns in L.E. Care Vane 2 found at final." (GC Exh. 26.) Crane refused to sign the warning. He testified that it was possible that the part came through the line on another shift. (Tr. 130.) Carlyle testified that Crane refused to sign the warning because he thought another operator ran the part again after he did. (Tr. 801.)

On May 6, 2002, Carlyle gave Crane a written warning[13] for defective work. The warning stated, "One hole missing on outer shroud. Operator 1919 failed to 100% inspect part. Part was found at final inspection." (GC Exh. 28.) Crane stated that he signed this warning because Carlyle told him that other operators who failed to detect the same defect were disciplined. (Tr. 131.)

On May 30, 2002, Carlyle gave Crane a final written warning after finding another defective part attributed to Crane on the final inspection table. The final warning stated, "Vane 1 row 4 has an excessive teardrop. Router was signed off as a good part and was sent on. Defect was found at Final Insp." (GC Exh. 31.) Crane testified that he disputed the warning arguing that the part could have been run through the process more than once because that type of part was being run on two machine lines at the same time. (Tr. 132.) Crane testified that he signed the warning because Carlyle disagreed with his assessment of what occurred and because he did not think it was in his best interest to push the matter. (Tr.133.) In contrast, Carlyle testified that Crane did not dispute the final warning and signed the warning form. (Tr. 770; R. Exh. 4(2).) The explanation given by Crane for signing the warning is dubious. This was his "final" warning so it is very unlikely that he would have signed the warning if he disagreed with the discipline. I credit Carlyle's testimony on this point.

b. Crane seeks a transfer

(1) Respondent's procedure and policy

Job vacancies in all cells are posted on the Respondent's bulletin boards. The manager of the cell in which the vacancy exists completes a personnel requisition form identifying the position classification, location, shift, the number of openings that need to be filled, whether the position is newly created position or a replacement, and the requisite experience or education for the position. (Tr. 842.) After receiving the signature approval of the human resources director and the Respondent's president, the personnel requisition form is posted on the bulletin boards for 7 days. (Tr. 842-843.) An employee interested in applying for the position must sign the posting.

In late November 2001, the Respondent posted a memo announcing a job postings policy change which most notably stated that "job posting will be offered to qualified associates who are not in a warning status for attendance and not in the bottom 20% of rolling quality based upon company seniority." (GC Exhs. 29 and 30.)

(2) The cell 4 postings

In early May 2002, cell 4 Manager, Steve Richardson, sought to replace three

[13] Crane stated that he and Carlyle discussed the "possibility" that the defect was caused by a machine malfunction, but Carlyle nevertheless issued a warning. (Tr. 131.)

employees by posting three operator positions in cell 4: two positions on third-shift and one on second-shift.[14] (Tr. 968; GC Exhs. 72 and 73.) Crane signed the posting for the cell 4, second-shift position. (Tr. 135, 137, 468, 848; R. Exh. 11.) One week later, Cell Manager Steve Richardson called Crane and another applicant, Allan Minarovic, to his office to tell them that two of the postings were being withdrawn.

Conflicting explanations were given for withdrawing the postings. Crane testified that Richardson stated that he had to abolish the second-shift posting and one third-shift posting because he was required to hold the positions open for two employees on medical leave. (Tr. 137.) Crane also testified that Richardson told him that a third-shift position might be posted at a later time. Crane stated that he told Richardson that he definitely was interested and that he would sign the posting. (Tr. 138.)

Employee Allan Minarovic, who was the General Counsel's witness, credibly testified that Richardson explained that he had misjudged the amount of work available and the number of people needed, so he was withdrawing the two postings. (Tr. 470.) He testified that Richardson also told them that he and Crane were the two highest senior applicants and therefore they would have gotten the jobs under company rules. According to Minarovic, Richardson stated that a third-shift job was going to be posted in the future, and if they were interested, they would have to re-sign the revised posting. Minarovic testified that both he and Crane told Richardson that they were not interested in working the third-shift. (Tr. 471.)

Human Resources Director Evans testified that the posting for the second-shift vacancy was withdrawn because Richardson put down the wrong shift. Evans stated that Richardson "really wanted somebody on the third-shift." (Tr. 850.)

Crane's testimony regarding the explanation given by Richardson for abolishing the postings is implausible for two reasons. First, his testimony is contradicted by fellow employee, Allan Minarovic, who was a very credible witness with good recall. Second, the evidence shows that no one was out on a medical leave of absence on the second or third-shift. Rhonda Miller, a cell 4 second-shift employee, was terminated in March 2002 after being out on a medical leave of absence for 1-year, thereby creating a vacancy. (R. Exh. 14(a).) Employee Gerry Hough did not begin his 1-year medical leave of absence until June 5, 2002, which would have been 3 weeks later. In addition, Hough was a first-shift employee. (Tr. 499, R. Exh. 16(c).) Thus, there is no evidentiary support for Crane's assertions about what he was told by Richardson.

Evans explanation is similarly dubious. First, it does not explain why Richardson would want someone for "the third-shift only," when the evidence shows that there also was a vacancy on the second-shift resulting from the termination of Rhonda Miller. (Tr. 973, 860.) Second, the evidence shows that 3 weeks after Richardson abolished the second third-shift posting, he reposted the position after Minarovic and Crane told him that they were not interested in working the third-shift. Finally, the Respondent inexplicably did not call Richardson as a witness to corroborate Evans' testimony or to explain why the two postings were withdrawn. Where a party fails to call a witness who reasonably may be assumed to be a favorable witness, an adverse

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[14] The evidence shows that Human Resources Director Curtis Evans approved a May 2, 2002 posting for the two third-shift openings in cell 4. (Tr. 966.) One of the third-shift positions was vacated by employee Ken Primmer, who was allowed to transfer to a cell 6 position without a posting. (Tr. 968, 974; GC Exh. 73.) The second-shift posting was to replace Rhonda Miller, who was terminated in March 2002 after being out on a medical leave of absence for 1 year. (Tr. 973, 860; R. Exh. 11.)

inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines,* 285 NLRB 1122, 1123 (1987). I find that an adverse inference is warranted that Richardson did not make a mistake when he initially posted the three job openings, but that he intended to do so.

For these reasons, I credit Minarovic's testimony about the explanation given by Richardson for rescinding two of the May 2002 postings.

On June 5, 2002, Richardson reposted a third-shift position in cell 4. (R. Exh. 12.) Crane signed the posting, even though it meant that he would have to take a pay cut. (Tr. 138, 197.) Crane testified that a couple of weeks later, he asked Richardson if he got the job and was told that it was a "done deal" as far as Richardson was concerned. According to Crane's unrebutted testimony, Richardson told him that he was waiting for Cell Manager Bill Miller to return the paperwork. (Tr. 139.) About 2 weeks later, Crane asked Miller if he had completed the paperwork and Miller told him that he was waiting for Human Resources Director Evans to return the paperwork to him. Later attempts by Crane to ascertain the status of his application for the posted third-shift position were equally unsuccessful. (Tr. 139-141.)

c. Crane testifies, then challenges his supervisor

In the meantime, on July 16, 2002, Crane appeared as a Union witness against the Respondent in NLRB Case 7-CA-44870.[15] Human Resources Director Curtis Evans and Supervisor Matt Carlyle were present throughout his testimony.[16] (Tr. 145.)

A day or so later, Carlyle and Crane got into a workplace argument. Carlyle testified that on the day in question cell 3 employees Bob Cain and Tim Harris were standing around talking 30 minutes after the second-shift had started. When Carlyle told them to get to work, Harris and Cain complained that the first-shift operators were leaving the machines empty when they finished their shift, a problem which had been brought to management's attention many times before.[17] (Tr. 803.) At that point, Crane walked over to the group asking Carlyle if there was a problem. (Tr. 788.) When Carlyle told him to go back to work because it was none of his business, Crane declined. (Tr. 789.) There was an exchange of words between Carlyle and Cain accompanied by raised voices. (Tr. 146-147, 804.) Crane testified that he attempted to calm everyone down, but Carlyle again told him to return to his machine. (Tr. 147.) Crane nevertheless remained without saying anything else, until the conversation between Carlyle and Cain ended about 5 minutes later.

Carlyle elaborated by testifying that he escorted Crane back to his workstation telling him, "[I]f he wanted a piece of the situation, him and I would go to Human Resources and dispute it up there." (Tr. 789, 804.) Carlyle initially testified that Crane did not respond, but on cross-examination, he conceded that he and Crane had a heated exchange at Crane's

[15] This was the unfair labor practice case, discussed above, that was decided by Judge Arthur Amchan on September 5, 2002. .

[16] Crane testified that the Respondent had no advance notice that he was going to testify because Crane took a vacation day to appear at trial and did not tell any management official that he had been subpoenaed to testify. (Tr.144.)

[17] The evidence shows that if there are no parts in the flow line at the beginning of a shift, a gap is created, which exists until a part passes down the line through several machines. It, therefore, affects the productivity of the on-coming shift. (Tr. 146, 805-806.)

workstation. (Tr. 804-805.) Carlyle testified that when he asked Crane "why he didn't go back to his work station, when I told him to. He said he had a right to be back there and listen to his fellow workers, to see what was being said." (Tr. 805.)

Crane testified that later that night he called Carlyle over to his machine, telling him that as a supervisor "he needed to watch how he presented himself to other employees so as not to cause problems." (Tr. 147.) Carlyle told Crane that Cain was acting belligerent and asked Crane if he was challenging his authority. Although Crane denied he was challenging Carlyle's authority, Carlyle disagreed. The two argued the point. (Tr. 148.) Crane testified that Carlyle then asked him why was he was always protecting people and Crane told him it was in his nature. (Tr. 149.) When Carlyle indicated that they could take the matter to Human Resources Director Evans, Crane told him that it was not necessary. Crane testified that Carlyle then asked him if he "wanted a piece of this" which Crane took as a physical threat. (Tr. 150.) Crane told him it was not a big deal, and the discussion ended.

A few hours later, Carlyle returned to Crane's workstation complaining that employee Ray Collins was spreading rumors around the plant that he, Carlyle, had threatened Crane by asking him "do you want a piece of me." (Tr. 151.) Crane acknowledged that the statement attributed to Carlyle was not accurate and that Carlyle had stated earlier "do you want a piece of this." (Tr. 810.) Carlyle cautioned Crane to "control" Collins because "that kind of talk doesn't need to be going around the shop." At break time, Carlyle came back to Crane, apologized, and told him he wanted the matter settled. Crane was not disciplined for any of these incidents.[18] (Tr. 201, 810.)

d. The midyear review and last chance agreement

On July 19, 2002, Carlyle gave Crane a midyear performance review.[19] (GC Exh. 32.) Crane testified that he met with Cell Manager Miller and Supervisor Carlyle to discuss the review. Carlyle told him that he "was above the 50 percent mark for rolling quality and that his productivity was slightly below department average." [20] (Tr. 141.) Crane testified that when he inquired whether a promotion from operator to specialist was possible, Carlyle told him "that a promotion was not unattainable. Basically, that I had to increase my productivity and keep my quality under control."[21] (Tr. 143, 786.) Carlyle could not remember anything about the meeting, except that it took place. (Tr. 791.)

On August 20, 2002, Carlyle called Crane to his desk, and in the presence of Cell Manager Miller, showed him a defective showerhead part on which Crane had worked. (GC Exh. 33.) As Human Resources Director Evans explained, the defective part was found by an operator in the machine at the beginning of the third-shift. The third-shift operator brought it to his supervisor's attention, and he brought it to Carlyle's attention. (Tr. 834.) Evans testified that

[18] Carlyle testified that he reported this incident to Human Resources Director Evans, including the fact that a rumor was being circulated about him physically threatening Crane. (Tr. 815.)

[19] According to Crane's unrebutted testimony, he was moved to different machines at least seven times during the first half of 2002. (Tr. 121-124.)

[20] Crane testified that he asked Carlyle for a copy of his rolling quality and productivity sheets, but was told that they were not available. (Tr. 143.)

[21] At the time of the midyear review, Crane was at the final warning stage of discipline. (Tr. 195, 834.)

if Crane had properly shim-checked the part, there would not have been a problem. (Tr. 835.) Evans explained that although he did not believe that the error warranted discharge, he thought it warranted some type of discipline particularly in light of Crane's prior errors. Evans asserted that he therefore gave Crane a last chance letter. (GC Exh. 34.)

Crane objected to the last chance letter. He argued that he had shim-checked the part, so Evans changed the language to read, "You did not effectively shim check." (Tr. 838.) Crane also complained that there was no time limitation on the conditions specified in the letter. Evans refused to set a time limit, but assured Crane that in assessing future discipline he would take into account the amount of time that passed between from the last chance letter and the next error. (Tr. 838.)

During the meeting, Crane also disputed the March 13 warning that he received for the backwall burn. Crane testified that Evans refused to discuss it. Evans testified that he told Crane that he would look into the matter, but until then, he was still going to issue the last chance letter.[22] (Tr. 156, 839-840.)

Crane told Evans that under company policy a discipline should be removed if the employee submits a process change in writing, which prevents the defect. (Tr. 154.) He stated that he had submitted such a process change, but never got a response from management, and did not know if the change was ever implemented. (Tr. 155; GC Exh. 33.) Crane was unable to persuade Evans to withdraw the last chance letter on this basis. Crane testified that he signed the last chance agreement "SUD" which meant it was signed under duress.

Finally, Crane testified that in the course of the last chance meeting, he asked Evans about the posted cell 4 position for which he had applied 2 months earlier. Crane credibly testified that Evans told him that "because of my poor work quality history that I was not qualified for that position." (Tr. 156.) Evans did not deny or rebut this aspect of Crane's testimony. Miller, who was also present at this meeting, did not testify. I, therefore, credit Crane's unrebutted testimony on this point.

Instead, at trial, Evans testified that the June 5, 2002 posting was canceled because in early to mid-June 2002, there was a downturn in work in cell 3, and that the Respondent was not able to absorb employees by moving them from area to area, so it canceled the posting in cell 4 and solicited employees to take a voluntary layoff as of July 1. (Tr. 852-853.) Evans did not explain, however, the manner, if any, in which this business downturn affected the filling of positions in cell 4. Instead, he testified that that during the same timeframe, May–June 2002, some regular employees were temporarily transferred to positions in cell 4, but none of those jobs were posted. [23] (Tr. 855, 856.) Evans did not explain why a cell 3 person, like Crane, who had prior experience working in cell 4, and had a pending request to work their again, would be denied the opportunity to transfer to that cell, even if it were only on a temporary basis. Evans'

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[22] Evans testified that he subsequently spoke to Supervisor Matt Carlyle, who told him that there was no plausible explanation for the backwall burn, other than operator mistake. (Tr. 840.)

[23] Employee Allan Minarovic testified that on February 16, 2002, Company President David Yacavone explained to the employees that business was starting to slow down. (Tr. 464.) He further testified that in the spring of 2002, there were rumors on the shop floor that business was slowing down. (Tr. 479-480.) While that corroborates Evans' testimony that there was a downturn in business, it does not explain why the Respondent twice posted and rescinded job postings in cell 4 with full knowledge that business was slowing down. It also does not explain why the Respondent filled the cell 4 positions on a temporary, rather than full-time basis.

testimony concerning Crane's transfer request raises more questions than it answers and is implausible.

Evans also testified that although he did not know whether any employees were notified that the June 5 posting had been canceled, he explained the "situation" to Crane at a later point in time. (Tr. 853.) Notably, Evans did not specify, nor could he recall, where or when he discussed the "situation" with Crane. He testified that he told Crane that "due to the uncertainty over our workload, that we were not going to be filling any permanent positions for a while."[24] (Tr. 856.) Crane credibly testified on rebuttal that Evans did not tell him during the August 2002 disciplinary meeting, or at any other time, that his transfer was denied because of economic circumstances. (Tr. 1018-1019.) In light of the vagueness of Evans' testimony on this point, I credit Crane's testimony that he was never told by anyone that his transfer request was denied because of economic circumstances.

e. Subsequent events

Crane testified that he and Miller left the last chance meeting together. As they walked toward the shop floor, Crane reiterated his complaint that the March 13 and May 30 warnings were not warranted. According to Crane, he opined to Miller that it was unlikely that the backwall burn part was his error because the part was being run on two machines at the same time and because he had conferred with the inspector several times while he was working on the part. (Tr. 157.) Crane testified that at that moment the inspector, Michael Galbreath, walked by and "I asked him if he could relay to Bill Miller how many times I had checked with him on those defects to see if they were passable or not. He said he couldn't remember how many times, but he verified that I had checked with him several times." (Tr. 157.) Crane stated that he was not sure of Miller's reaction, but thought it was something to the effect that he would have to look into it further. Neither Miller nor Galbreath testified at trial. I credit Crane's unrebutted testimony on this point.

Crane further testified that a short time later he spoke with Jim Naperala, a quality engineer assigned to the Norton Shores facility, about the backwall burn.[25] Although Naperala did not inspect the actual part, Crane described the defect to him and sought his opinion as to how it may have occurred. (Tr. 158.) Crane prevailed upon Naperala to write a note stating that a backwall burn could be caused by improperly setting the electrodes or by running the part a second time. (GC Exh. 27.) Naperala did not testify at trial.

A short time later, Crane gave Evans a copy of Naperala's note and told him about Galbreath's comments. (Tr. 161.) Evans reviewed the situation with Carlyle, who did not believe that there was a plausible explanation for the backwall burn - other than operator error. Evans therefore refused to withdraw the discipline. (Tr. 839-840.)

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[24] According to Evans, the third-shift position in Cell 4 was posted again in October or November 2002. (Tr. 857.)

[25] The General Counsel asserts that Naperala was a supervisor and/or agent within the meaning of the Act, but did not submit any evidence to prove that he met any of the requisite supervisory indicia, except an organizational chart produced by the Respondent. (GC Exh. 7 and 8.) The Respondent denies that Naperala is a supervisor and asserts that the charts contain supervisory and nonsupervisory personnel. (Tr. 158-160.) I find that the General Counsel has not satisfied his evidentiary burden of proving that Jim Naperala is a supervisor or agent within the meaning of the Act.

In late September 2002, Crane passed along another part that was found at final with a partially drilled hole. (Tr. 868.) On September 24, Crane met with Cell Manager Bill Miller and Human Resources Director Evans. (Tr. 165.) The part and the router were present for Crane to inspect. (Tr. 868.) According to Crane, Evans told him that a defective part that he had run was found at final and, therefore, his employment was being terminated. Evans testified that Crane did not dispute or deny that it was his part and that he signed off on it. (Tr. 782-783, 868.) Crane did not dispute this assertion. Rather, he testified that he told Evans that several times a week the routers were getting mixed up and that he thought the found at final policy was "messed up." (Tr. 166.) At the end of the meeting, Crane's employment with the Respondent was terminated, effective September 24, 2002.

On October 16, 2002, 3 weeks after Crane was terminated, the cell 4 job that he had applied for on June 5, was reposted and employee Allan Minarovic was selected to fill the position.

2. Analysis and findings

a. The legal standard

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that union activity was a motivating factor in the employer's decision.[26] Specifically, the General Counsel must establish union activity, knowledge, animus or hostility, and adverse action, which tends to encourage or discourage union activity. *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991). Inferences of animus and unlawful motive may be inferred from the total circumstances proved and in some circumstances may be inferred in the absence of direct evidence. *Fluor Daniel, Inc.,* 304 NLRB 970 (1991). Once accomplished, the burden shifts to the employer to persuasively establish by a preponderance of the evidence that the reasons for its decision were not pretextual or that it would have made the same decision, even in the absence of protected concerted activity. *T&J Trucking Co.,* 316 NLRB 771 (1995).

b. Union activity, knowledge and animus

The undisputed evidence reflects an open and ongoing advocacy by Crane on behalf of the Union/WAGE, which began during the organizing campaign and continued during an election bar year. The undisputed evidence also shows, and the Respondent concedes in its posthearing brief, that the Respondent knew that Michael Crane was an avid supporter of the Union and WAGE. He was actively involved in the Union organizing campaign and testified for the Union against the Respondent in a postelection Board hearing. He was one of three WAGE officers, who openly solicited employees to join WAGE, and expressed his views on workplace problems in the WAGE newsletter. Notably, Crane advocated for his coworkers on the shop floor. Supervisor Matt Carlyle candidly testified that more than once, Crane intervened on the behalf of other employees, eventually prompting a slightly exasperated Carlyle to ask Crane, in mid-July 2002, why he always felt the need to protect other employees. (Tr. 149, 814.)

Ample evidence also exists of the Respondent's animus toward the Union, including the activities of WAGE. The factual findings of the July 31, 2001 decision of Judge Shamwell adequately disclose that the Respondent opposed the Union from the outset of the organizing

[26] *In re Manno Electric, Inc.,* 321 NLRB 278, 280, fn. 12 (1996).

campaign.[27] (GC Exh. 3(A).) The September 5, 2002 decision of Judge Amchan likewise describes various pro-union activities in the spring, summer and fall of 2001, and concludes that "Johnson Technology vigorously opposed the organizing campaign." (GC Exh. 3(B).)

Independent of the factual findings in those decisions, the unrebutted evidence here shows that the Respondent's opposition to the Union continued well beyond October 24, 2001, when the Union failed to win the Board election. In February 2002, Company President Yacavone stated at an employee meeting that the cost of the opposing the Union had impacted the Company's profitability, and consequently impacted on the employee's profit shares. (Tr. 464-465, 521.) He further stated that he would do whatever he could to defeat the Union. (Tr. 464.) On September 30, 2002, Yacavone sent a letter to all employees pointing out that although a majority of employees had voted against unionization a year earlier, the Union did not go away. Yacavone explained that the "law allows them, if they have a minimum of 30% of employees here sign cards, to have another election after October 24. To do that, they need your support." (GC Exh. 6.) He reminded the employees of "the distractions and disruptions and tension that occurred during the last year's election campaign" before closing the letter by stating:

> Don't let them gain your support. Don't let them distract us from concentrating on pleasing our customers. Please don't sign any union card or other union document. Don't let them gain at your expense. We didn't need them then and we don't need them now. Tell them to do what they promised last year, the one promise they can deliver. Tell them to just go away.

Finally, the credible evidence shows that a confrontational relationship developed between Crane and his supervisor, Matt Carlyle, because Crane persisted in advocating on behalf of coworkers, which Carlyle interpreted as a challenge to his supervisory authority. Thus, the evidence supports a reasonable inference of animus directed specifically toward Crane because of his WAGE activity.

Accordingly, I find that the evidence viewed as a whole shows that the Union through WAGE continued its effort to organize the Respondent's employees beyond October 24, 2001, and as a result the Respondent's opposition to the Union/WAGE continued throughout the election bar year. I further find Michael Crane was a determined and vocal Union/WAGE supporter known to the Respondent and that his WAGE activities were opposed by the Respondent.

c. The unlawful denial of transfers

The evidence shows that for years the Respondent's predecessor had made an effort to assist and allow employees, who were not proficient machine operators, to transfer to other positions. According to the unrebutted testimony of Richard Klein, the Respondent's former human resources director, that practice continued after the Respondent acquired the business in 1997 at least up until the time that Klein retired in 1999. (Tr. 632.) Klein could not recall discharging anyone for a bad parts error during his employment tenure with the Respondent. (Tr. 632-633, 638.)

[27] Regardless of whether the numerous Sec. 8(a)(1) violations in Judge Shamwell's case are upheld by the Board, it is settled law that conduct that may not be violative of the Act may still be used to show continuous animus. *Gencorp.,* 294 NLRB 717, fn 1 (1989).

The evidence also shows that consistent with that practice several operators in 2001-2002 were encouraged by their supervisors to apply for other jobs within the Respondent's facility and were allowed to transfer to other positions in order to avoid further discipline up to and including discharge. For example, General Inspector Robert Skantz, who inspected cell 3 parts in 2001-2002, testified that several operators had numerous repeat errors in that timeframe, including employees Ricky Tatum, Jason Probelski, Mike Short, Scott Smith, and Nate Faucher. (Tr. 613-617.) His testimony was corroborated as follows.

Jason Probelski, a third-shift cell 3 operator, testified that by August 2001, he had made so many bad part errors "that I was at a position where too many more and that would have been the end of it."[28] (Tr. 455-456.) He further testified that he was approached by his cell 3 manager, Tom Viehl, who "told me that you only get so many before you're gone, anyway, and there is this position open and you could, if you wanted to, take–you know, would you want to take the utility position instead. (Tr. 456.) Probleski stated that he accepted the position, trained for 1 month on the third-shift, and then transferred to the first-shift utility position. He never saw a posting for the job and did not recall signing one. Probleski stated that he did not wear any paraphernalia either pro or antiunion during the organizing campaign, except on election day, when he wore an antiunion hat. (Tr. 458.)

Ricky Tatum was another third-shift cell 3 operator. He testified that in 2002 he was called to a meeting with Cell 3 Manager Bill Miller and Sales Coordinator Rick Bowen. (Tr. 268-269.) Tatum testified that Miller told him that he "was in the lower 20 percent of the quality and that, you know, you're falling in the lower 20 percent of quality and you would risk losing your job or if you do another bad part, he told me if I get another bad part, I could risk losing my job in other words." (Tr. 269.) Tatum was unaware of a posted job in another cell until Miller brought it to his attention. He signed the posting and transferred to the new job a couple of days later. (Tr. 271.) Tatum testified that during the Union organizing campaign, he wore a vote no Union T-shirt. (Tr. 273.)

Jacob Jackson was also a third-shift cell 3 operator. He testified that in 2002 he was concerned about the number of bad part disciplines that he had accumulated so he went to see Cell 3 Manager Miller. According to Jackson, Miller told him that if he was error free for 6 months a discipline would drop off. (Tr. 231.) Miller also told him that he was eligible to transfer to a utility position, but he was only 2 months away from having a discipline dropped. (Tr. 231-232.) Jackson opted to remain in cell 3 after his supervisor explained to him that if he suggested a line improvement, which was implemented and proved workable for a month, a discipline would be dropped. Jackson made such a suggestion, which was implemented, and one of his disciplines was removed. (Tr. 232-233.) Jackson testified that during the organizing campaign he did not wear any T-shirts, pro or con union, but after the election, he wore a no Union T-shirt to work. (Tr. 234.)

The credible evidence, therefore, shows that the practice of encouraging and allowing employees with poor quality control to transfer to other jobs, which existed when the Respondent acquired the facility in 1997, continued in existence in 2002. The credible evidence also shows that transfers typically were completed expeditiously and in some instances did not even require the employee to sign a posting.[29]

[28] Probleski stated he did not know exactly how many bad parts he had produced, but he knew it was over five. (Tr. 457.)

[29] The evidence shows that vacant positions are posted for 7 days and typically are filled

Continued

In contrast to the experiences of Probelski, Tatum, and Jackson, the undisputed evidence shows that no one ever told, encouraged or allowed Crane to transfer to another position, even though Bill Miller was his cell manager, and even though Crane signed a posting and sought to transfer out of cell 3.

By May 6, 2002, Crane had received his third discipline, i.e., a written warning for passing along a part with one hole missing. Neither Miller nor any other supervisor approached Crane recommending that he "get off the machines for a little while." Instead, in early May, Crane on his own applied for a posted second-shift position in cell 4.[30] Shortly after he applied, Crane was told that the posting had been rescinded.

A short time later, on June 5, Richardson posted another cell 4 third-shift position. Crane applied for the job. Unlike most postings, the position was not filled within a week. To the contrary, after three weeks passed, Crane asked Richardson and Miller whether he got the job. He was told that it was only a matter of processing the paperwork. Neither manager told Crane that he was ineligible for the position because of poor work quality[31] or that the position was not going to be filled.

Four more weeks passed and Crane still had not heard whether he got the job. On July 19, Miller and Carlyle gave Crane his mid-year performance review. Carlyle told him that he needed "to concentrate on raising his level of productivity and watch his quality while doing so." (GC Exh. 32.) Carlyle also told Crane that he was above the 50 percent mark for rolling quality and that his productivity was slightly below department average. When he asked if a promotion to a specialist position was still possible, the unrebutted evidence shows that Carlyle told him that a promotion was possible if he increased his productivity and watched his quality control. Significantly, at no time did Miller or Carlyle tell Crane that he was ineligible to transfer because of his work quality and productivity or that he was not going to get the posted job.

The undisputed evidence shows that the first time Crane heard that he would not be transferred to the cell 4 position was in mid-August 2002 at the last chance meeting, which was more than 2 months after he applied for the job. In the course of that meeting, Crane asked Human Resources Director Evans about the status of the job he applied for in early June. The unrebutted credible evidence shows that Evans told him that because of his poor work quality he was not qualified for the position and, therefore, would not be transferred.

The credible evidence viewed as a whole shows that Crane was treated differently than other operators and that Evans' stated reason for denying Crane a transfer was pretextual. To begin with, the Respondent's conduct was contrary to the well-established practice of encouraging and allowing operators with work quality problems to transfer. There is no evidence, or argument, that the quality of Crane's work was worse than Probelski, Tatum, and Johnson, who were encouraged to transfer because of their poor work quality. Rather, the evidence shows that despite his operator errors, Crane's work was above the 50-percent mark for rolling quality and his productivity was slightly below department average. In addition, there is no evidence showing that in 2001 and 2002 the Respondent denied a transfer to any other

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within the next 7 days. (Tr. 271, 457.)

[30] Crane was the most senior qualified person for the position.

[31] The unrebutted credible evidence shows that when Crane applied for a third-shift cell 4 position on May 23, Richardson told him that he was the most senior qualified applicant. (Tr. 470.)

cell 3 employee because of poor work quality, except Crane. Accordingly, I find that the General Counsel has satisfied his initial evidentiary burden of showing that Crane was denied a transfer to cell 4 because of his Union/WAGE support.

At trial, and in its posthearing brief, the Respondent sought to defend its action by asserting that Crane was denied a transfer because the Company went through an economic slowdown in 2002, which forced it to freeze all permanent transfers from June to October 2002. That proffered explanation is unconvincing for several reasons. First, it is different from the reason told to Crane at the last chance meeting. Under settled Board law, shifting explanations warrant a reasonable inference that the reasons given are pretextual and that the true reasons are unlawful. *Atlantic Limousine, Inc.,* 316 NLRB 822, 823 (1995). Second, there is no evidence that the downturn in business, which purportedly began in February-March 2002, affected the work in cell 4 where Crane wanted to transfer. (Tr. 938.) Instead, Evans testified that:

> This was early to mid-June time period. We had just recently found out that the magnitude of business loss in Cell 3, was that we weren't going to be able to absorb people by moving them from area to area, and rather than do a permanent posting, we cancelled the posting, and we were in the process of soliciting people to take voluntary lay-off, and I think it was July 1st was a Monday, we ended up laying off somewhere between fifteen and twenty people. (Tr. 852.)

A few minutes later, he stated that the Respondent "temporarily transferred some people from one cell to another. You know, they were regular employees, but they were not permanently assigned to Cell 4."[32] (Tr. 855.) The evidence shows that none of the employees who were temporarily transferred to cell 4 were required to go through the posting procedure. It is difficult, therefore, to understand why the cell 4 posting that Crane signed was rescinded if the Respondent was "temporarily" transferring permanent employees to cell 4. It is more difficult to understand why a cell 3 employee, like Crane, who had expressed a preference to move to cell 4 by signing two postings and by repeatedly asking if he was going to be transferred, was not accommodated with at least a temporary transfer to cell 4, where he had previously worked.

The notion that cell 4 was not affected by the business downturn is further supported by the fact that the cell 4 position was reposted in June with Evans' approval and by the absence of evidence that the employees were notified that the posting had been rescinded. When the Respondent's attorney asked Evans if the employees were told that the posting was rescinded, Evans inexplicably stated that he did not know. (Tr. 853.) In addition, Evans was vague on when and where he eventually told Crane that he was not going to be transferred and never explained why he waited over 2 months to tell him that he was not going to be transferred, if he purportedly knew that was the case in early June. (Tr. 856.)

Finally, the evidence shows that the Respondent reposted the very same cell 4 position approximately 3 weeks after Crane was discharged, even though business had not improved and arguably had gotten worse. (Tr. 857.) Cell 3 employee Allen Minarovic testified that he was on layoff in October 2002, when cell 4 Supervisor Richardson called him at home to tell him that

[32] Evans testified that no permanent positions were posted between June–September 2002. The evidence shows, however, that in September 2002 there was a posting for a preventive maintenance operator position. (Tr. 939; GC Exh. 64.) There is no evidence that Cell Manager Bill Miller or any other supervisor encouraged Crane to apply for the position or brought the posting to his attention.

he was chosen for the cell 4 posting. Minarovic testified that Richardson told him "[h]owever, if I chose to come back, that they would have to lay off a less senior person and he asked me, since I was already presently laid off, if I wouldn't mind staying laid off til the end of the year, and I said no problem." (Tr. 481.) Minarovic stated that he could have returned in November 2002, but it did not make sense, because "the last quarter of the year is pretty busy and to try to train a new person on a new job would be kind of detrimental to company interests." (Tr. 482.) He also stated that in "December of 2002, they announced they were going to have to ask for more voluntary layoffs for the start of the first quarter of 2003. They did also say that the only shifts that would be working was first and third. I already bid on the second-shift job. So I elected to stay on layoff due to that right there." (Tr. 482.) Minarovic was not recalled from layoff until March or April 2003.

The evidence, therefore, shows that shortly after Crane was discharged the Respondent posted and filled the cell 4 position, even though the economic conditions, which Evans proffered as the reason for not allowing Crane to transfer, still existed and even though those conditions delayed the transfer of Minarovic to that position until some 5 months later.

Based on the evidence viewed as a whole, I find that the Respondent's reasons for denying Crane a transfer are pretextual. Rather, the evidence shows that he was denied a transfer because of his Union/WAGE activity. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act as alleged in paragraph 7(a) of the amended consolidated complaint.

The amended complaint also alleges that Crane was unlawfully denied a transfer in retaliation for testifying at a Board hearing on July 16, 2002. The credible evidence does not support this allegation. First, the Respondent's conduct shows that it had decided to deny a transfer for Crane long before the July 16 hearing. In late May, the Respondent rescinded the first posted cell 4 position which was almost 7 weeks before Crane testified. It then reposted the position on June 5, but allowed it to remain unfilled for several weeks after Crane signed the posting, even though posted positions are typically filled shortly after the posting is signed and closed. Also, on July 1, the Respondent began filling cell 4 positions on a temporary basis with permanent employees, but did not temporarily transfer Crane, even though Evans testified that work was down in cell 3 and he knew that Crane had requested to transfer to cell 4.

Second, there is no evidence that the Respondent knew prior to July 16 that Crane was going to testify at the Board hearing. Crane testified that he did not tell any one in management that he had been subpoenaed to testify. Rather, he kept it a secret and took a vacation day to attend the hearing.

Thus, the evidence viewed as a whole supports a reasonable inference that the Respondent by its conduct had decided to deny Crane a transfer long before the July 16 Board hearing. Accordingly, I find that the evidence does not persuasively show that the Respondent refused to transfer Crane in retaliation for testifying at a Board hearing. I, therefore, shall recommend that the allegations of paragraph 10(a) of the amended complaint as it pertains to the refusal to transfer Crane be dismissed.

d. The unlawful last chance agreement

Paragraphs 7(b) and 9 of the amended complaint allege that the Respondent required Michael Crane to enter a last chance agreement because of his Union activity.

The undisputed evidence shows that in August 2002, Crane misloaded a part in a machine at the end of his shift, which was discovered by the operator on the next shift, when

that operator started the machine. (Tr. 773-775; GC Exh. 34.) Because Crane had not signed the router indicating that the part was complete and acceptable, he was not assessed a "303" operator error.[33] Instead, the Respondent determined that under the circumstances a lesser degree of discipline should be issued because Crane did not follow standard operating procedures by effectively shim-checking the part. (Tr. 834-835.) In other words, although the mistake which prompted the last chance agreement was a quality-related type error, it was not considered a "303 found at final" error by the Respondent because technically, Crane did not produce a bad part.

That aside, the General Counsel argues that the Respondent treated Crane differently than other employees by giving him a last chance agreement because no other employee received such discipline for producing a bad part and because Crane's last chance agreement had no time limit. The Board has held that "[a]n essential ingredient of a disparate treatment finding is that other employees in similar circumstances were treated more leniently than the alleged discriminatee was treated. *Thorgen Tool & Molding,* 312 NLRB 628, fn. 4 (1993). The burden, of course, is on the General Counsel to show those circumstances.

The General Counsel's evidence shows that around the same time another cell 3 operator misloaded a part at the end of his shift, i.e., employee Nathan Faucher, a third-shift operator known for frequently making operator errors. (Tr. 434, 437.) On July 10, 2002, he, like Crane, misloaded a part on the third-shift that had to be shim checked by the first-shift operator who took over the machine. (*See* G.C. 9(b).) Unlike Crane, Faucher was attributed a "303" operator error for this infraction. This was his fourth "303" error in a 6-month period, which should have put Faucher at the final warning stage, like Crane. There is no evidence, however, that Faucher was disciplined for this infraction or the one before it. (Compare GC Exhs. 9(a) and (b).)

In response to the General Counsel's subpoena duces tecum, Human Resources Director Evans prepared two disciplinary charts: General Counsel's Exhibits 9(a) and (b). The first, General Counsel Exhibit 9(a), purportedly lists all cell 3, found at final, "303" type errors for the period of January through August 2002. This chart, however, does not reflect that Faucher was disciplined for the July 10 error. Rather, the only operator discipline attributed to Faucher on General Counsel Exhibit 9(a) occurred on February 18, 2002, when he received a verbal warning for a part found at final.

General Counsel Exhibit 9(b) is a more detailed chronological list of cell 3 disciplinary action for the period of March 4 through September 10, 2002. It shows that Faucher committed a 303 operator error on March 25 and July 1, 2002, his second and third errors. At trial, however, Evans testified that Faucher received a "verbal counseling" for the March 25 operator error, even though this was his second offense. (Tr. 986-987.) Evans did not explain why.

In its posthearing brief at pages 28-29, the Respondent's counsel conceded that the verbal counseling issued for March 25 was "out of order" or inconsistent with the found-at-final policy because it should have been a verbal written warning. He did not, however, explain why it occurred.

Nor did the Respondent offer any evidence showing that Faucher was disciplined in accordance with the found-at-final policy for his next two operator errors, i.e., on July 1 and 10,

[33] Since Crane was at "final warning" status, he likely would have been discharged if it had been a "found at final" or "303" operator error.

2002. In its posthearing brief at page 29, the Respondent's counsel concedes that Faucher should have received a written warning for the July 1 error and should have been at the final warning stage on July 10. (*See* GC Exh. 9(b.) However, those errors are not reported on General Counsel Exhibit 9(a) nor is there any other evidence–documentary or otherwise–showing that Faucher was disciplined for those mistakes.

In the course of the hearing, the Respondent submitted the progressive disciplinary records for Jerry Cain (R. Exh. 27–verbal, written, and final warnings); Michael Short (R. Exh. 26–verbal and written warnings); and Jacob Jackson (R. 21-verbal and written warnings) in order to show that these employees were disciplined in accordance with Company policy. The progressive disciplinary records for Nathan Faucher were not submitted, other than the verbal warning on February 18. Because Faucher's mistake in misloading a part was designated as a "303 error," it is reasonable to expect that the Respondent would introduce Faucher's complete disciplinary record to show that he was disciplined in the same manner as Crane. The Respondent did not do so.

An adverse inference may be drawn regarding an employer's real motive where the employer relies on "weak" evidence, but is in possession of "stronger" evidence to corroborate or contradict other evidence concerning its actual motive. "The failure to produce such evidence not only strengthens the probative value of its absence, but of itself is clothed with a certain probative force. *Paudler v. Paudler,* 185 F. 2d 901, 903 (5th Cir. 1950). More specifically, "[t]he theory behind the [adverse inference] rule is that, all other things being equal, a party will of his own volition introduce the strongest evidence available to prove his case. If evidence within the party's control would in fact strengthen his case, he can be expected to introduce it even if it is not subpoenaed. Conversely, if such evidence is not introduced, it may be inferred that the evidence is unfavorable to the party suppressing it." *Auto Workers v. NLRB,* 459 F.2d 1329 1338 (D.C. Cir. 1972). Based on the evidence viewed as a whole, I find that an adverse inference is warranted that the discipline, if any, issued to Nathan Faucher for his July 1 and 10 errors was not the same nor was it more severe than the last chance agreement given to Crane under similar circumstances. Otherwise, the Respondent would have introduced Faucher's complete progressive disciplinary record to that it acted consistently.

In addition, there is no evidence showing that any other employee at any time received a last chance agreement for a quality type error. To the contrary, the evidence shows that the other last chance agreements issued by Human Resources Director Evans were all for nonproduction/quality type infractions. Employee Randy Brush was given a last chance agreement for substance abuse. (R. Exh. 8.) Employee Terry Weigandt was given one for falsifying a time voucher. (GC Exh. 42.) Employee Julian Espinoza received a last chance agreement for making derogatory and unprovoked comments about co-worker Dean Herrera. (R. Exh. 9.) Employee Herrera was given a last chance agreement for physically threatening Espinoza. (GC Exh. 51.) There is no evidence showing that any employee, except Crane, received a last chance agreement for a quality type infraction. If the Respondent intended to show by introducing other last chance agreements that the conditions imposed on other employees were not less severe than those imposed on Crane, it was obliged to show that the other last chance agreements were warranted by circumstances similar to Crane's. The absence of any last chance agreements that were issued for quality type infractions warrants a reasonable inference that there is none.

However, with respect to the General Counsel's assertion that Crane's last chance agreement was overly broad, the evidence shows that there is no consistency among the last chance agreements submitted with respect to time limits. Two of the last chance agreements had time limits which varied greatly in duration, i.e., Brush was 2 years, Weigandt was 1 year.

(R. Exh. 8; GC Exh. 42.) While the other two last chance agreements (Espinoza and Herrera) contained no time limits. (R. Exh. 9; GC Exh. 51.)

The evidence viewed as a whole nevertheless supports a reasonable inference that by giving Crane a last chance agreement, the Respondent treated him differently than other employees in similar circumstances. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act as alleged in paragraphs 7(b) and 9 of the amended complaint.

The amended complaint also alleges that the Respondent gave Crane a last chance agreement in retaliation because he testified against the Respondent in an unfair labor practice hearing on July 16, 2002. Given the timing of the last chance agreement, along with (1) the absence of any evidence that any other employee received a last chance agreement for a quality type error and (2) the absence of any evidence that Crane was treated the same as Faucher, a similarly situated employee, I find that the evidence supports a reasonable inference that the discipline was issued in retaliation because Crane testified at the July 16 unfair labor practice hearing. Accordingly, I find that the Respondent violated Section 8(a)(4) of the Act by giving Crane a last chance agreement.

e. The unlawful discharge

On May 30, 2002, Michael Crane received a final warning for having excessive teardrops on a part and passing it along as acceptable. (Tr. 770; R. Exh. 4(a).) He did not dispute the final warning and signed the warning form. (Tr. 770-771.) Crane remained in final warning status for the next 3 months. On September 7, Inspector Russell Scott found a part at final, which had one hole missing. (Tr. 778-780, 786; R. Exh. 6(c).) Crane had signed the router accepting the part. On September 24, 2002, he was terminated for this error.

The General Counsel argues that if the Respondent had followed its policy of removing disciplines after 6-months, Crane would not have been in final warning status and therefore he should not have been discharged. In an effort to show that the Respondent has a policy of removing disciplines after 6-months, the General Counsel called cell 3 operator Jacob Jackson as a witness. He testified that in April 2002 he received a written warning for a 303 error and was contemplating transferring out of cell 3 because he was concerned about losing his job. He discussed the matter with Cell Manager Bill Miller, who told him that after 6 months, a discipline drops off. (Tr. 231, 239-240.) Jackson testified that Miller told him that in 2 months one of his disciplines would drop off, so Jackson decided to stay in cell 3.[34] The Respondent did not call Cell Manager Bill Miller to dispute Jackson's testimony or explain why he was not called. The failure to call Miller warrants an adverse inference he would not have rebutted Jackson's testimony. Nor did any other witness for the Respondent specifically contradict or rebut Jackson's testimony on this point.[35]

[34] Former Human Resources Director Richard Klein testified that during his tenure a 6-month rule was applied to attendance infractions, but stopped short of stating that the same rule applied to bad part disciplines. (Tr. 632.) However, his unrebutted credible testimony was that he could not recall ever disciplining any employee for bad part errors. Rather, if an employee was consistently producing bad parts the supervisor would request a transfer for the employee, who would be reassigned. (Tr. 633.)

[35] In its posthearing brief at p. 26, the Respondent inaccurately asserts that Jackson testified that the 6-month rule applied to discipline issued because of rolling quality and not to discipline issued under the found-at-final policy. (Tr. 237.) Although Jackson testified that the 6-month rule was applicable to discipline under rolling quality, he was not asked and did not state that it was

Continued

Instead, on direct examination, the Respondent's counsel asked Human Resources Director Curtis Evans the following question:

> Q. And if you know, was there any timeframe over which these disciplines would remain active?
>
> A. There was nothing committed to paper, but informally, I mean, a twelve-month period is kind of a rule of thumb, where if something is not active within twelve months, you have to take that into account in evaluating, you know, how meaningful that is. (Tr. 832.)

Evans' response is vague. It does not specifically rebut Jackson's testimony. In addition, it is unconvincing. As human resources director, he, if anyone, would have been the best witness to directly dispute Jackson's assertions or alternatively deny that a 6-month rule exists or ever did exist. He did not do so. An adverse inference is warranted where a witness does not deny, or only generally denies without further specificity, certain adverse testimony from an opposing witness. *Asarco, Inc.,* 316 NLRB 636, 640, fn 15 (1995). I find that Evans' testimony, or lack thereof, was not credible and warrants an inference that the Respondent had a policy for removing discipline after 6 months. For all of these reasons, I credit Jackson's testimony that the Respondent had a 6-month policy applicable and I find that it was applicable to the found-at-final disciplines.

The evidence shows that as a result of a 303 error committed on February 13, 2002, Crane was verbally counseled by Supervisor Matt Carlyle on February 27. That being so, under the 6-month rule, the verbal counseling that Crane was given on February 13, 2002, should have been removed on August 13, 2002, thereby removing Crane from final warning status. (Tr. 748, 754; R. Exh.1.) That did not occur. At trial, and in its posthearing brief at page 25-26, the Respondent did not explain why the February 13, 2002 verbal counseling was not removed.

Instead, the Respondent focused on the March 13, 2002 written verbal warning that Crane received for a 303 error committed on that date. This was the second discipline in the progressive discipline process. That warning would have been eligible to be removed from Crane's record on September 13, 2002. The evidence shows, however, that 6 days earlier, on September 7, Crane committed the 303 error, which resulted in his discharge. (R. Exh. 6(a).)

On one hand, there is no evidence or argument by the General Counsel that the Respondent strictly enforced the 6-month rule with respect to Crane's March 13 discipline. On the other hand, there is no evidence that the Respondent even considered accommodating Crane by removing his March 13 warning because it was 6 days short of removal under the 6-month rule. That omission, coupled with the fact that the Respondent failed to remove the February 13 verbal counseling, lends credence to the General Counsel's assertion that the Respondent did not follow its policy because it was intent on discharging Crane.[36]

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not applicable to the found-at-final policy, nor does the evidence viewed as a whole support such an inference. See Tr. 237.

[36] The fact that the election bar was due to expire on September 24, 2002, and that the Respondent was urging its employees to reject the Union's on-going efforts to organize, further supports a reasonable inference that the Respondent sought to discharge Crane because of his active and ongoing support for the Union.

In addition, the Respondent's unlawful failure to transfer Crane was a significant factor contributing to his ultimate discharge. The evidence shows that the found-at-final policy applied only to cell 3. In all other cells, including cell 4 where Crane sought to transfer, discipline was conducted under the rolling quality system. The undisputed evidence shows that Crane did not have a rolling quality problem. (Tr. 829.) Thus, it is more likely, than not, that had Crane been allowed to transfer to cell 4, even on a temporary basis in the summer 2002, he would not have incurred discipline in September 2002 leading to discharge.

The likelihood of avoiding further discipline had he been allowed to transfer to cell 4 is further increased by the evidence showing that (1) unlike cell 3, all other cells had in-process inspections during which the inspectors had the option of fixing a defective part themselves or taking it back to the operator to fix and (2) the Respondent was more tolerant of operator errors in the other cells. Indeed, cell 5 operator Dean Herrera testified that he produced 20 to 30 bad parts, and had a major conflict with his supervisor, before Cell Manager Ken Grant arranged for him to transfer to a utility position. (Tr. 416-417.) Similarly, cell 4 operator Bradley Buchan testified that he produced nine bad parts in 2002 and 3-4 bad parts in 2003.

Based on the evidence viewed as a whole, I find that the Respondent has failed to show that it would have discharged Crane, even in the absence of his Union/WAGE activity. Accordingly, I find that the Respondent unlawfully discharged Michael Crane in violation of Section 8(a)(3) of the Act as alleged in paragraphs 8(a) and 9 of the amended complaint.

The amended complaint also alleges that the Respondent unlawfully discharged Michael Crane in violation of Section 8(a)(4) because he testified at the unfair labor practice hearing in July and filed a unfair labor practice charge in early September 2002. The failure of the Respondent to follow its policy by removing Crane's February 13 verbal counseling after 6-months, which came on the heels of Crane filing a unfair labor charge charge, supports a reasonable inference that the Respondent sought to retaliate against him further because he invoked his rights under the Act. Accordingly, I find that the Respondent also violated Section 8(a)(4) of the Act by discharging Crane.

D. Charles Durham

1. Facts

Charles Durham was a 22-year employee, who began working for the Respondent's predecessor as operator and progressed to a specialist with the Respondent.[37] In January 1999, Durham was promoted to the supervisory position of cell 4 coordinator. (Tr. 277, 884.)

a. Durham's involvement with the Union

In spring 2000, the Union organizing drive was building momentum. Management speculated that a cell 4 employee named Gerry Hough was the leading Union advocate. Charlie Durham supervised Hough. The Respondent instructed Durham to monitor Hough's activities closely. (Tr. 282, 488.)

[37] In 1997, the Respondent acquired the Latimer Drive and Norton facilities. The evidence shows that the predecessor's employees were represented by the International Association of Machinists (IAM) from early 1980 to 1987. During this time, Charlie Durham was an IAM shop steward.

Not long afterwards, Durham attended a supervisor's meeting at which the rotation of team leaders was discussed. After the meeting, Durham purportedly revealed to some employees privileged information that was discussed at the meeting. As a result, he was summarily removed as a supervisor. Instead of terminating Durham, the Respondent allowed him to return to the plant floor as a specialist in cell 8. (Tr. 276, 284-285, 327, 885.)

Shortly thereafter, Durham became very active in the Union organizing campaign.[38] (Tr. 62, 287.) He attended Union meetings, wore Union hats, buttons, and T-shirts to work, and distributed the same to other employees. (Tr. 287, 289.) On several occasions in the summer of 2000, Durham was cautioned about openly supporting the Union by his friend and neighbor, Richard Klein, the Respondent's former vice president of human resources.[39] (Tr. 291-292.) Durham nevertheless continued to support the Union over the next year.

In summer 2001, the local police received an anonymous tip that Durham was operating a motor vehicle on a suspended driver's license.[40] (Tr. 374-375.) The police went to Durham's home, confronted him, and warned not to drive again on a suspended license. Because he could not drive to and from work, Durham asked the Respondent if he could work a flexible work schedule so he could ride to and from work with a neighbor, who also worked for the Respondent.[41] (Tr. 886.) The Respondent accommodated Durham by allowing him to work a flexible schedule over the next 9 months until his driver's license was reinstated in June 2002.

Durham's testimony concerning his active involvement with the Union after being warned by the police about driving on a suspended license is confusing, contradictory, and suspect. He initially testified that he was active in the Union campaign all the way up to the election. (Tr. 376.) He subsequently intimated, however, that he was less involved with the Union campaign right before the election stating that "he was more involved with the IUE in the beginning" of the organizing campaign. (Tr. 380.) When asked to clarify his level of activity shortly before the election, Durham equivocated stating that his involvement in the Union organizing campaign "never really changed, no, but, for a period, it did slow down, because [he] was scared" after someone notified the police that he was driving on a suspended driver's license. (Tr. 380.) I find that the evidence supports a reasonable inference that between June-October 2001, Durham's support for the Union was tempered, more cautious, and less visible.

b. Durham's involvement with WAGE

On October 24, 2001, the Union lost the Board election. Afterwards, the Union called a group of employees together to discuss forming a WAGE group. (Tr. 577-578.) Durham testified that he did not join WAGE right away because he was very upset with the Union for going forward with an election without sufficient employee support to win. (Tr. 329, 373.) He also

[38] Union Organizer O'Brien began helping with the Union organizing campaign in August 2001. (Tr. 573.) He described Durham as one of the top organizers. (Tr. 576.)

[39] The evidence shows that Klein retired from the Respondent in 1999. (Tr. 630.)

[40] Durham speculated that someone from management may have notified the police. There is no evidence to support that speculation, nor did Durham attempt to offer any information to substantiate his belief. (Tr. 375.)

[41] The neighbor was undergoing medical treatment that required him to arrive late to work on certain days.

testified that he was apprehensive about getting actively involved in WAGE,[42] after being anonymously reported him to the police. (Tr. 374-375.)

In December 2001, WAGE held a Christmas party to solicit employees to join the group. (Tr. 578.) Durham testified at trial that he attended the WAGE Christmas party in December 2001, and thereafter attended WAGE meetings on a monthly basis. (Tr. 294, 330.) He also stated that he continued to wear Union T-shirts once a month after the election. However, in a pretrial statement, dated March 7, 2003, Durham stated that after the Union lost the election, he kept a low profile, stopped wearing Union T-shirts and hats to work, and did not sign up for WAGE or attend their meetings. (Tr. 331, 333-334, 373.) When asked on cross-examination to explain the discrepancy between his testimony and his pretrial statement, Durham testified that his period of inactivity ended in December 2001 because he had calmed down and spoken with some Union organizers from out-of-town. (Tr. 378.) Asked why he did not mention that fact in his pretrial statement, he unpersuasively testified that he "probably didn't think of [it] at the time," even though he conceded that when he gave the pretrial statement, he thought it was important to highlight everything he did for WAGE. (Tr. 379-380.) Durham's explanation for the discrepancy is unconvincing and not very credible. Observing him testify at trial, his explanation sounded like a post hoc attempt to create the impression that he was an ardent supporter of WAGE from its early beginning.

Adding to my skepticism is Durham's testimony that he joined WAGE as a nondues paying "supporter" a couple a months after the 2001 Christmas party. (Tr. 294, 328.) A search of a WAGE computer database, however, reflects that the earliest recordation of Durham joining WAGE was August 2002. (Tr. 585-587; GC Exh. 56 and 57.) No other documentary evidence was offered to establish that Durham joined WAGE prior to August 2002. Union Organizer Larry O'Brien could not recall Durham being on any membership lists prior to that time. (Tr. 590.)

Durham also testified that in spring 2002, he began distributing WAGE newsletters at work, as well as WAGE buttons and pens. (Tr. 295.) He also stated that around that time he received a WAGE T-shirt, which he wore to work once a month, and that he alternated wearing the WAGE T-shirt with a Union T-shirt. (Tr. 296.) Durham stated that every once in awhile, if he had an extra WAGE T-shirt, he would give it to an employee. (Tr. 297.)

However, Union Organizer Larry O'Brien testified that after the Christmas party, Durham may have attended two or three WAGE meetings between December 2001 and August 2002. (Tr. 581.) He also stated that he basically kept in contact with Durham once a month by phoning him to keep up with what was going on in cell 8.[43] Significantly, when specifically asked if Durham took any kind of leadership role in WAGE, O'Brien testified that Durham:

> … was very reluctant to do this at the time, because he had some personal issues going on. He also had a feeling that if he was not able to attend meetings, that that would not allow him to be

[42] Durham testified that after the election, he noticed various supervisors, cell managers, and team leaders watching him as he worked. (Tr. 298.) He did not give any specifics of who, when, and how long this occurred. I do not credit his testimony on this point because it is vague and self-serving.

[43] It is noteworthy that Durham did not call O'Brien to report what was going on in his cell or meet with him face-to-face on a regular basis as might be expected of someone actively involved with WAGE.

> in any kind of a leadership-type role, at that time.
>
> Also, it was summertime, and I remember it specifically, because Charlie is a golfer, and our meetings were on Sunday, so he wasn't able to attend, plus he had some driving problems and lived a ways from the shop. (Tr. 581.)

This portion of O'Brien's testimony did not paint a picture of Durham as an active WAGE supporter.

However, O'Brien subsequently contradicted himself by stating that in March or April 2002, he gave Durham WAGE buttons and T-shirts to pass out to employees. (Tr. 583.) He also stated that even before that, he gave Durham newsletters to pass out to employees. (Tr. 584.) But on cross-examination, O'Brien contradicted himself again by testifying that Durham did not become actively involved in WAGE until August 2002. (Tr. 593-594.) O'Brien's vacillating testimony raises serious questions about his own credibility, as well as the actual involvement of Durham in WAGE prior to August 2002.

In an attempt to define Durham's activity on behalf of WAGE, Union Organizer Julie Rigor testified that Durham attended WAGE meetings, but she did not state how often or when. (Tr. 47.) She also testified that she did not know when Durham joined WAGE as a "supporter." (Tr. 77.) Significantly, Rigor explained that WAGE did not create and distribute its T-shirts until August-September 2002. (Tr. 53.) Indeed, the evidence shows that Michael Crane, an open and outspoken WAGE advocate, did not receive his WAGE T-shirt until September 2002. (Tr. 115.) Rigor further testified that she did not have "extra" T-shirts to hand out. She had a limited number of WAGE T-shirts and that in order to get one, an employee had to attend a WAGE meeting. (Tr. 53.) Rigor unequivocally stated that there was no way an employee could get a WAGE T-shirt other than attend a meeting. (Tr. 53-54.) Rigor's credible testimony contradicts the testimony of both Durham and O'Brien that the WAGE T-shirts were created and distributed in March or April 2002. It also contradicts Durham's testimony that he passed out extra T-shirts to supporters.

Durham also testified that he passed out a WAGE survey at least 3-4 months prior to October 2002. He speculated that he could have handed it out possibly as far back as the beginning of 2002, but was not positive that it was that far back. (GC Exh. 22; Tr. 297-298.) Both Rigor and O'Brien, however, testified that the survey was not distributed until September 2002. (Tr. 56, 592.) In addition, the survey itself reflects a date of "Sept-Oct 2002." (See GC Exh. 22, p. 4, upper right-hand corner.) I find that this evidence further contradicts Durham's assertions that he actively supported WAGE as early as the spring of 2002 and further calls into question his credibility about the extent of his activities, if any, on behalf of WAGE prior to the time he joined the group in August 2002.

For these reasons, I do not credit the testimonies of Durham and O'Brien that Durham was a WAGE supporter prior to August 2002. Their testimonies are internally and externally inconsistent, and contradicted by the testimony of Julie Rigor, another witness called by the General Counsel. In light of the numerous inconsistencies, and considering the evidence viewed as a whole, I find that Durham unpersuasively embellished his involvement with WAGE prior to joining the group as a nondues paying member in August 2002.

c. The events of October 20, 2002

On Sunday, October 20, 2002, Charlie Durham volunteered to work 4 hours of overtime between 8 a.m.–12 p.m., at double his regular rate of $18.65/hour.[44] (Tr. 299, 336.) Although his regular weekday shift was 7 a.m. to 3 p.m., Durham stated that he signed up to start work at 8 a.m. on the weekends because he did not want to incur a penalty in the event that he arrived after 7 a.m. on any given weekend. (Tr. 384.)

Durham's testified that as he approached the outside gate to the plant, on Sunday, October 20, the low fuel light in his truck came on. He "parked in front of the gate at the visitor's parking section." (Tr. 299, 339.) He was unsure if he scanned the gate with his identification card or if it was open, but he walked through the gate, scanned the turnstile, went through the door, and punched in. "After I punched in and saw it was 6:42 [a.m.], I stood there for a minute, and I thought, well, shoot, I've got enough time to run down and get gas. I don't really have to start until 7 o'clock. And so I went back out to my truck, got in it, and left."[45](Tr. 300, 345.) He went out the door, through the turnstile, pushed a button to open the outside gate, and walked back to his truck, which was parked in the visitor parking section. He stated that he drove to a nearby Wesco gas station, put gas in his truck, and came back to the plant. (Tr. 302.)

Durham testified that when he returned to the plant, he parked "[i]n the visitor's parking lot again, outside the gate." (Tr. 302, 351.) He believed he scanned the gate, backed up into the visitor's parking space, got out of his truck, and walked through the gate. (Tr. 351.) He stated that upon entering the plant, he went to his toolbox in his cell, and went right to work. (Tr. 352.)

The entire scenario of Durham coming to work, punching in, leaving, and returning again was recorded by a time-lapse videotape and also by the Company's Oracle timeclock system. (Tr. 306, 893-894; GC Exh. 39; R. Exhs. 30(a)-(c).) Unbeknownst to Durham, he was also observed on an overhead video monitor by two employees in cell 8. The observations of the employees, as corroborated by the videotape and time clock, contradict Durham's testimony in several respects. (Tr. 657-669, 671-680, 915-919; R. Exh. 34.)

Employee Richard Sobers (RSobers) testified that on Sunday, October 20, he was working an overtime shift of 11 p.m.–7 a.m. in cell 8. His workstation was located approximately 10 feet from an overhead video monitor fed by a camera focused on the entrance gate outside the facility. (Tr. 657, 668.) As RSobers was finishing up work on his shift he looked up at the monitor and saw a truck that looked like Durham's drive through the open gate, pull up to the outside door, and stop in the driveway. (Tr. 658, 659.) RSobers saw Durham get out of the truck, scan through the turnstile, and enter the building while his truck stood running outside the door. A few minutes later, RSobers saw Durham exit the plant, walk over to the scan pad which opens the gate, press the button to open the gate, get back into his truck, back out of the gate, turn around in the visitor's parking space, and drive away from the facility. (Tr. 658, 915-917.) Thus, the credible testimony of RSobers, which is corroborated by the videotape, contradicts Durham's testimony that he parked his truck in the visitor's parking area, exited it and walked through the gate, and came back out because after punching in at 6:42 a.m. he realized that he

[44] Durhan stated that he had volunteered to work overtime for several weekends in the fall of 2002.

[45] Durham testified that he wanted to get home by 12:30 p.m. to watch the start of a Nascar race on television. (Tr. 299.) He, therefore, decided to go for gas before he began working so he would not have to stop on the way home. Upon returning to the plant, he parked in the visitor's lot because it is faster to leave from that location at the end of the shift. (Tr. 340-341.)

had time to drive to the gas station. To the contrary, the evidence that Durham drove through the gate, and left his truck running outside the turnstile of the door, while he entered the facility to punch in, persuasively shows that he had decided to punch in and leave the facility even before he got out of his truck.

RSobers stated that a few minutes later, his father, Harold Sobers (HSobers), also a Company employee working an overtime shift, came over to his workstation. (Tr. 671.) Rsobers told him what he had observed and commented, "I wonder if Charlie went over to Westco." (Tr. 659, 672.) Rsobers needed to enter his time in the Oracle time system. He asked HSobers to watch the monitor to see if Durham returned to the plant, while he went to record his work hours. (Tr. 660.)

HSobers watched the video monitor. About 10 minutes later, he observed Durham pull up outside the gate, back into a visitor's parking spot, shut off his lights, and wait inside his truck, until another vehicle drove up and scanned the gate open. (Tr. 669, 673, 918-919.) At that point, HSobers observed Durham exit his truck carrying a small paper bag, walk through the gate, scan through the turnstile, and enter the plant.[46] (Tr. 673.) Thus, the credible testimony of HSobers, which is corroborated by the videotape, contradicts Durham's assertion that he scanned the gate, backed into the visitor's parking spot, exited his vehicle, and walked to the turnstile.

HSobers further testified that after watching Durham reenter the facility he walked up to the breakroom where he saw Durham sitting having coffee and eating a donut. (Tr. 674, 680.) HSobers stated that he entered the breakroom, made small talk with Durham, and left the room. (Tr. 674-675.) Durham did not recall if he was carrying anything with him when he returned from Wesco. However, he denied going to the breakroom and having coffee and donuts before going to work. (Tr. 352-353.) Because various aspects of Durham's testimony concerning October 20 are contradicted by RSobers, HSobers, and the videotape, and because Durham demonstrated a proclivity to fabricate testimony, I do not credit his denial on this point.

Durham worked until noon, completed a time voucher, and recorded working 5-½ hours for the day (6:42 a.m.– 12:12 p.m.).[47] He, therefore, charged the customer for the time he spent going for gas and having his coffee and donut before actually starting to work. (Tr. 304, 907; R. Exhs. 30 (a)-(c).) Although Durham could have submitted a correction card the next day reflecting his actual worktime, and although he testified that he intended to do so, he did not. At trial he unconvincingly asserted that he forgot to do so. (Tr. 305, 307.)

On their way home, RSobers and HSobers discussed whether they should report what they had observed Durham doing. They concluded that they should notify their supervisor. The next workday, HSobers told Supervisor Chris Beckley that someone should check the videotape for Sunday, October 20, which he did. (Tr. 675.) Beckley reported the matter to Human Resources Manager Sherry Torz, who notified Human Resources Director Evans. (Tr. 890.) Over the next several days, Evans reviewed the videotape, checked the timecard system, and interviewed both of the Sobers. (Tr. 891.) Based on this investigation, Evans concluded that Durham had entered the facility at approximately 6:40 a.m., clocked in, and then left the

[46] The evidence shows that Durham was gone for approximately 12 minutes. (Tr. 669.)

[47] If Durham wanted to get home by 12:30 p.m. to watch a NASCAR race on television at 12:30 pm, one has to wonder why he worked more than the 4-hours of overtime that he volunteered to work? He arguable could have left work at 11 a.m., with plenty of time to gas up and drive home. I find that the NASCAR race aspect of his testimony is specious.

premises. He returned 10-12 minutes later, went to the breakroom for some amount of time, and then went to work. (Tr. 892, 897-898.)

In the meantime, and later that week, Durham's supervisor told him that he needed to fillout a correction card for Wednesday, October 23, 2002, because he forgot to punch in on that day. (Tr. 308; GC Exh. 40.) Although he completed the correction card for October 23, Durham was not prompted by the occasion to correct his timecard for October 20.

On October 25, Durham received his paycheck, which included the time worked on October 20. (Tr. 305.) Durham again was not prompted by the occasion to submit a correction card for the time spent getting gas, as well as the time spent consuming coffee and donuts, after he punched in. (Tr. 909.)

On October 28, a coworker told Durham that he saw some supervisors watching a monitor that showed his truck coming and going. (Tr. 309.) Two days later, on October 30, Durham was called to a meeting with Human Resources Director Evans and Human Resources Manager Sherry Torz. (Tr. 685, 910.) Evans told Durham that some employees were watching the video monitor on Sunday, October 20, and saw him entering and leaving the plant. He wanted to know what happened.[48]

Durham testified on direct examination that he told Evans that he did not remember the incident. (Tr. 310.) When Evans told Durham that he had a video that he could watch to refresh his recollection, Durham declined to review the video. Evans asked Durham if he left the plant after punching in. (Tr. 357.) Durham testified that he did not recall at that time leaving to get gas and returning with coffee and donuts. (Tr. 311.) On cross, Durham conceded that he may have denied that he left the plant when questioned by Evans. (Tr. 357.) He then testified on cross-examination that he was not really sure if he gave an explanation to Evans, but added, "I think in that meeting I did say later on something about the low fuel light after I started remembering some of the things about that day. I think I remember something about the low fuel light came on–coming on in my truck." (Tr. 358.) Durham then equivocated by stating that he was not sure whether he did or did not mention the low fuel light coming on. Durham's testimony that he could not remember the details of what occurred on October 20 when he met with Evans was unconvincing. The fact that he declined to review the videotape to refresh his recollection supports a reasonable inference that he knew what Evans was talking about during their meeting on October 30.

Unlike Durham, Human Resources Manager Sherry Torz did not equivocate. She testified that Evans asked Durham several times "if he clocked in, and then left the premises … [and Durham said], "No." (Tr. 686.) She stated that once or twice Durham stated that he did not recall, but the majority of time he said, "No, that doesn't make sense. Why would I do that?" (Tr. 687.) Torz testified that Evans specifically asked Durham twice if he went to Wesco. The first time he said, "No, I didn't," and the next time he responded, "I don't recall." (Tr. 687.) According to Torz, Durham never mentioned the low fuel light during the meeting and he never mentioned a NASCAR race. (Tr. 689.)

Torz' testimony was corroborated by Evans. He stated that Durham told him that he clocked in a little before 7 a.m. and that he went straight to work. (Tr. 910.) Evans testified that he specifically asked him, "So, you didn't leave the facility once you clocked in?" to which

[48] Durham acknowledged that he was given an opportunity to explain what occurred on October 20. (Tr. 358.)

Durham replied, "No, I didn't do that." (Tr. 910.) Evans stated that he told Durham, "Well, if we have–if I tell you that I have two witnesses that can testify that they saw you leave, and I have also got it on video tape, what would you say then?" to which Durham responded, "I don't remember." (Tr. 910.) Evans offered to allow Durham review the videotape, but Durham declined the offer.[49]

According to Durham, Evans told him that incorrect vouchering was a serious offense.[50] When Evans asked Durham how he vouched his time, Durham told him that he was not sure. At that point, Evans and Torz left the room for a few minutes. Durham testified that when they returned, Evans told me "that based on the severity of the situation, and the circumstances involved, that I was going to be terminating his employment." (Tr. 912.)

Durham stated that he was shocked and that he told Evans, "I left for ten minutes and came back. People do it all the time. It was just a ten-minute mistake. I give you like 25 free hours a year on my Activities Committee that I run, and I've come and gone a few times, and I always made my corrections out. This time I forgot, and I'm going to be terminated." (Tr. 312-313.) Durham's response is telling. He effectively admitted at the end of the meeting that he left the facility and returned, after he initially denied doing so, and after he asserted that he could not remember what occurred on October 20. Durham's revelation casts further doubt on his ability to tell the truth.

On November 4, 2002, Durham met with the Respondent's president, Dave Yacavone, and Human Resources Manager Torz. Durham told them that "the low fuel light had come on in my truck and so I punched out and left or I punched in and then I left and came back and went to work." (Tr. 359.) Torz stated that Durham explained that there was a NASCAR race that he wanted to watch after work and he wanted to have gas to get home. (Tr. 689.)

After his termination, Durham sought to invoke the Respondent's peer review process. (Tr. 362.) He had served on a peer review committee several years before. (Tr. 389.) His request for a peer review was granted and the process began. (Tr. 363.) He participated in the selection of three panel members and was given the opportunity to tell his side of the story. (Tr. 365.) He told the panel about his low fuel light, leaving for about 10 minutes, returning, and that he went right to work. He also told them that afterwards he forgot about leaving and vouchered all of his time. (Tr. 365.) The committee did not reinstate Durham. (Tr. 366.)

2. Analysis and findings

Under *Wright Line,* the General Counsel must first show Durham's union activity. The credible evidence shows that prior to June 2001, Durham was an active and open Union advocate. However, the credible evidence also shows that two events occurred in June 2001 that caused Durham to temper his active involvement with the Union organizing campaign and refrain from becoming involved with WAGE.

The first was the anonymous telephone call prompting a police visit to Durham's home to warn him against driving on a suspended license. Durham speculated that someone in management may have called the police and therefore he maintained a low profile for the

[49] A copy of the actual video tape was placed on a CD and made part of the record. (Tr. 913; R. Exh. 34.)

[50] Accurate vouchering is important because it enables the Respondent to determine how much to charge the customer. (Tr. 353-354.)

balance of the organizing campaign. The second event was the decision by the Union organizing committee in June 2001 to file a petition for an election. The undisputed evidence shows that Durham opposed this course of action because he believed that the Union did not have sufficient support to win an election. After the Union lost the election, Durham did not embrace WAGE. He testified that he became disenchanted with the Union and withdrew from its organizing committee.

There is no credible evidence that Durham's involvement with WAGE was extensive or prolonged. Durham's testimony concerning his involvement with WAGE between October 24, 2001 and August 2002 was confusing, inconsistent, self-contradictory, contradicted by the testimony of other witnesses called by the General Counsel, and unconvincing. Even the General Counsel concedes in its posthearing brief at page 18, that Durham's testimony concerning his involvement with WAGE was confusing and unclear. Moreover, his attempt to portray himself as an active participant in WAGE activities during this time period was unpersuasive and virtually unsupported by anyone with first hand knowledge of what took place in the plant. Indeed, of all the Respondent's employees who testified at trial for the General Counsel, not one stated that he or she received a WAGE button, pen, survey, T-shirt, or application from Durham at any time. Not one employee testified that he/she saw Durham passing out any of these WAGE items to other employees. In addition, none of the WAGE newsletters published prior to November 2002 ever mentioned Durham's name. (See G.C. Exhs. 20(c)-(g).)

Thus, the credible evidence shows that in the 12-month period preceding his discharge, Charlie Durham's union activity consisted of the following. He joined WAGE as a nondues paying member in August 2002. He received a WAGE T-shirt in September 2002, which he may have worn to work once prior to his discharge. He completed a WAGE survey and he returned it to WAGE in October 2002.

Under the *Wright Line* analysis, the General Counsel must show that the Respondent knew of Durham involvement with WAGE. Where an individual discharge occurs, the General Counsel must demonstrate that the employer was aware of the prounion activity or sentiments of the individual employee. *Birch Run Welding & Fabricating, Inc. v. NLRB,* 761 F.2d 1175, 1179-1180 (6th Cir. 1985). This knowledge need not be established directly. It can be based on circumstantial evidence from which a reasonable inference of knowledge may be drawn. In the present case, there is no direct evidence that the Respondent knew that Durham was a WAGE member. The circumstantial evidence falls short of supporting a reasonable inference of knowledge.

There is no evidence of that Durham had a close relationship with a known WAGE adherent that may have given the Respondent reason to believe that Durham also supported WAGE. Michael Crane did not testify that he and Durham ate lunch together or took breaks at the same time. The evidence shows that, except for Crane and two other WAGE officers, the names of the other WAGE officers and members were a carefully guarded secret. (Tr. 79-82.)

There is no evidence of animus directed toward Durham from which to infer that he was suspected to be a WAGE supporter. For example, there is no evidence or argument that statements were made to Durham, either during the 12-month period preceding his discharge, or at any other time, that could be construed as a threat, specified or otherwise, or that would indicate that the Respondent knew or suspected that Durham was involved with WAGE. There is no conduct by the Respondent, such as denying him a transfer or transferring him to a less desirable job, which raises the specter of animus. To the contrary, the undisputed evidence shows that the Respondent permitted Durham to continue working a flexible schedule through

June 2002, when his driver's license was reinstated. The evidence also shows that when Durham applied to have his driver's license reinstated, Steve Richardson, the management official responsible for overseeing cells 4, 5, 6, 7, and 17, wrote a recommendation letter for Durham. (Tr. 888-889.) Finally, Durham testified that two months before he was discharge, which would have been in August 2002, he came to work late. Although his supervisor could have assessed Durham a penalty point for tardiness, Durham prevailed upon him to refrain from doing so because it would ruin his perfect attendance record. (Tr. 384.) These types of conduct do not conjure an image of an employer who suspects an employee of being a union supporter and is out to get him.

Nor does the timing of the discharge support a reasonable inference of knowledge. Neither the General Counsel nor the Charging Party point to any precipitating event immediately preceding the discharge that would support such an assertion. Rather, the evidence shows that the Respondent was unaware of the circumstances underlying Durham's discharge until two employees reported those circumstances to the Respondent. Although the General Counsel argues that the two employees were opposed the Union and therefore that taints their account of the events, I find that their union predilections – pro or con - are of no consequence, unless the General Counsel can show that they were instructed by the Respondent to keep an eye on Durham, and that the circumstances were fabricated, neither of which is true. To be sure, the videotape and time clock system resolves any doubts about what the two witnesses observed.

The credible evidence does not show that the reason for discharge was pretextual. Durham was recorded on videotape entering the plant with his truck running outside, punching in, leaving to get gas, returning with coffee, clocking out over 5-hours later, and claiming all of the time on his voucher. When confronted, he pretended to be unable to recall the event, denied it ever happened, and then subsequently gave an unconvincing explanation for doing it. The Respondent discharged him for falsifying his voucher and lying about it. The reasons given are not baseless, unreasonable, or contrived as to render them pretextual.

The Board has held that under certain circumstances an inference of knowledge can be based on evidence of disparate treatment. *Industrial Material Clearance,* 341 NLRB No. 41, slip op. at 6 (2004). The General Counsel and the Charging Party that there is a disparity between the discipline issued to Durham and the discipline issued to his co-worker for the same type of activity.

They rely on the evidence showing that for a period of time employees routinely left the Respondent's premises without clocking out to get breakfast for themselves and others and often with their supervisor's knowledge and consent. (Tr. 243, 420, 490-491.) The is no evidence that anyone was disciplined for these "breakfast runs." What the evidence does show is that in December 2001 the Respondent, a major defense contractor, installed gates and security cameras around its premises, purportedly as a precaution after the events of September 11, 2001. The evidence also shows that after the gates were installed the practice was discontinued. (Tr. 253.) Employee Michael Keife testified that going out for breakfast changed once the gates were installed. (Tr. 253.) Employee Billy Lee Davis testified that "[p]eople used to go get breakfast. That's been a few years ago." (Tr. 246.) The only examples that Charlie Durham could recall occurred when he was supervisor in cell 4, and could not recall any other more current examples. (Tr. 316.)

There is no credible evidence showing that the breakfast run practice continued into 2002, except for the testimony of former employee Tina Belinger, who in response to General Counsel's leading question stated that to her knowledge employees were going out for breakfast and lunch from "[p]robably about 2001 through now." (Tr. 558.) Belinger was

discharged by the Respondent in December 2002, after being demoted from a Team Leader position, which calls into question her impartiality. Her testimony, given on January 26, 2004, is not based on firsthand knowledge because she was terminated in December 2002. When asked by me whether the Respondent ever issued a rule prohibiting employees from leaving to buy breakfast, Belinger conceded that in 2001 the Respondent posted such a rule, but she could not recall any specifics. (Tr. 569-571.) She stated that the practice did not stop completely, but they had "to really chill on it" and keep it low key. (Tr. 569.) Belinger was less than completely candid with me, which further taints her credibility. Nonetheless, other than her dubious testimony, there is no evidence that the practice continued after December 2001.

The General Counsel and Charging Party also rely on the evidence showing that employees, like Carol Kruzona and Gerry Hough, were not discharged when they left the premises without permission. (Tr. 243-248, 496; GC Exh. 43 and 44.) Instead of discharge, the Respondent issued warnings in accordance with the disciplinary policy. There is no evidence that either of these employees denied that they had left the premises and thereafter fabricated a story about why they did so. Lying or the lack of honesty is one of the reasons given by the Respondent for terminating Durham and there is no evidence or argument that lack of honesty was a factor in any of the other disciplines. I am not persuaded that the circumstances were similar in all material aspects.

Lastly, the General Counsel's reliance on Durham's Union activity during the initial organizing campaign is insufficient to establish an inference of knowledge and animus with respect to his October 2002 discharge. That Union activity is remote in time. It occurred in more than 12-months prior to Durham's discharge. By Durham's own account, he tempered his Union activity in June 2001, after the police visited his home regarding his suspended driver's license and then distanced himself from the Union after the Union lost the election.

At best, the circumstantial evidence shows that the Respondent was aware of WAGE's on-going efforts to maintain employee interest in the Union and its efforts to organize the Respondent's employees, and that the Respondent opposed these efforts. However, in the absence of any evidence, which would have caused the Respondent to suspect that Durham was involved with that effort, I find that the circumstantial evidence is insufficient to support a reasonable inference that the Respondent knew or suspected that Durham was a WAGE member, when it discharged him in October 2002.

Accordingly, I find that the General Counsel has not met its *Wright Line* evidentiary burden and I shall recommend that the allegations that Charles Durham was discharged in violation of Section 8(a)(3) of the amended complaint be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Johnson Technology, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, IUE-CWA, The Industrial Division of Communications Workers of America, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) the Act.

3. Working @ GE (W.A.G.E.) is not a labor organization within the meaning of Section 2(5) of the Act; rather W.A.G.E. is an extension of the IUE-CWA, The Industrial Division of Communications Workers of America, AFL-CIO, CLC.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the

following conduct:

(a) Denying Michael Crane the opportunity to transfer out of cell 3 to cell 4 because of his Union support.

(b) Requiring Michael Crane to enter a last chance agreement because of his Union support.

(c) Discharging Michael Crane because of his Union support.

5. The Respondent violated Section 8(a)(4) and (1) of the Act by engaging in the following conduct:

(a) Requiring Michael Crane to enter a last chance agreement because he testified for the Union at an unfair labor practice hearing on July 16, 2002.

(b) Discharging Michael Crane because he testified for the Union at an unfair labor practice hearing on July 16, 2002, and because he filed an unfair labor practice charge against the Respondent in September 2002.

6. The acts of the Respondent described above constitute unfair labor practices affecting commerce within the meaning of the Section 8(a)(1), (3) and (4) and Section 2(6) and (7) of the Act.

7. The Respondent did not otherwise engage in any other unfair labor practice alleged in the amended complaint in violation of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discharged Michael Crane, denied him the opportunity to transfer out of cell 3 to cell 4, and required him to enter a last chance agreement in violation of Section 8(a)(3) of the Act, I shall recommend that the Respondent be ordered to reinstate Michael Crane to a cell 4, second-shift, operator position, without prejudice to his seniority or other rights and privileges, or if any such position does not exist, to a substantially equivalent position in cell 4, on second-shift; to remove from its files any reference to the unlawful discharge and unlawful last chance agreement; and to make Michael Crane whole for any loss of earnings and other benefits he may have suffered, computed on a quarterly basis, less any interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

Having found that the Respondent discharged Michael Crane and required him to enter a last chance agreement in violation of Section 8(a)(4) of the Act, I shall recommend that the Respondent be ordered to reinstate Michael Crane effective immediately to a cell 4, second-shift, operator position, without prejudice to his seniority or other rights and privileges, or if any such position does not exist, to a substantially equivalent position in cell 4, on second-shift; to remove from its files any reference to the unlawful discharge and unlawful last chance agreement; and to make Michael Crane whole for any loss of earnings and other benefits he may have suffered, computed on a quarterly basis, less any interim earnings, as prescribed in

F. W. Woolworth Co., supra, plus interest as computed in *New Horizons for the Retarded,* supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[51]

ORDER

The Respondent, Johnson Technology, Inc., Muskegon, Michigan, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Denying Michael Crane the opportunity to transfer out of cell 3 to cell 4 because of his Union support.

(b) Requiring Michael Crane to enter a last chance agreement because of his Union support.

(c) Discharging Michael Crane because of his Union support.

(d) In any other manner interfering with restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer Michael Crane full reinstatement to a cell 4, second-shift, operator position, or if such position does not exist, to a substantially equivalent position in cell 4, on second-shift, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Michael Crane whole for any loss of earnings and other benefits he suffered as a result of the unlawful discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to its unlawful discipline of Michael Crane; and within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place to be designated by the Board or its agents all payroll records social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

[51] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Within 14 days after service by the Region, post at its Latimer Drive facility in Muskegon, Michigan copies of the attached notice marked "Appendix."[33] Copies of the attached notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of the business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 23, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 4, 2004

C. Richard Miserendino
Administrative Law Judge

[33] If this Order is enforce by a judgment of a United States court of appeals the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT deny Michael Crane the opportunity to transfer out of cell 3 to cell 4 because of his support of the IUE-CWA, The Industrial Division of Communications Workers of America, AFL-CIO, CLC and the Workers @ GE (W.A.G.E.).

WE WILL NOT require Michael Crane to enter a last chance agreement because of his support of the IUE-CWA, The Industrial Division of Communications Workers of America, AFL-CIO, CLC and the Workers @ GE (W.A.G.E.).

WE WILL NOT discharge Michael Crane because of his support of the IUE-CWA, The Industrial Division of Communications Workers of America, AFL-CIO, CLC and the Workers @ General Electric (W.A.G.E.).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Michael Crane full reinstatement to a cell 4, second shift, operator position, or if such position does not exist, to a substantially equivalent position in cell 4, on second shift, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael Crane whole for any loss of earnings and other benefits he suffered as a result of the unlawful discrimination against him, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to our unlawful discipline of Michael Crane and WE WILL, within 3 days thereafter, notify Michael Crane in writing that this has been done and that the discipline will not be used against him in any way.

JOHNSON TECHNOLOGY, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Federal Building, Room 300, Detroit, MI 48226-2569

(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.